IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 93 of 2007
In
COMPANY APPLICATION No. 126 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	NO
5	Whether it is to be circulated to the civil judge ?	NO

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INDIAN PETROCHEMICALS CORPORATION LIMITED - Petitioner(s)
Versus
. - Respondent(s)

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Appearance :
MR. K.S. NANAVATI, MR. MIHIR THAKORE, MR. S.N. SOPARKAR, ld. Sr. counsel with Mr. Nandish Chudgar, learned advocate for the petitioner.

Ms. Ami Yagnik, learned advocate for Official Liquidator

Mr. Girish Patel, learned sr. counsel with Mr. Shalin N. Mehta, ld. Advocate for the objectors.

MR HARIN P RAVAL for Central Government

Mr. P.R. Thakkar, learned advocate for objector on behalf of Ancillary Industries

,
MR RAMNANDAN SINGH for objector on behalf of SC/ST employees

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 16/8/2007

CAV JUDGMENT

1. Indian Petrochemicals Corporation Limited (hereinafter referred to as “IPCL”), the petitioner Company (Transferor Company) has filed this Company Petition under Section 391 read with Section 394 of the Companies Act, 1956, with a prayer that this Court may be pleased to sanction the Scheme of Amalgamation being Exh. “G” to the petition so as to be binding with effect from 1.4.2006, the appointed date, on the petitioner Company, the Reliance Industries Limited (hereinafter referred to as RIL), the Transferee Company and all their respective shareholders, creditors and all concerned persons. The said Scheme provides that the entire undertaking of the Transferor Company along with all its assets, debts, liabilities etc., shall stand

transferred to the Transferee Company, all legal proceedings pending by or against the Transferor Company shall be continued by or against the Transferee Company, the employees of the Transferor Company shall become the employees of the transferee Company and the Transferor Company shall allot to the shareholders of the Transferor Company shares in the Transferee Company in the proportion mentioned in the Scheme.

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2. The facts giving rise to this petition are as under:

FACTS ABOUT THE TRANSFEROR COMPANY:

2.1 The petitioner Company was incorporated on 22.3.1969 in the State of Gujarat under the Companies Act, 1956 (hereinafter referred to as “the Act”). The petitioner Company has its registered office at P.O. Petrochemicals, Dist. Vadodara, Gujarat.

2.2 The objects for which the petitioner Company has been established are set out in its Memorandum of Association. One of the main objects is to carry on the business of processing, converting, producing, manufacturing, formulating, using, buying, acquiring, importing, storing, packaging, selling, transporting, distributing, exporting and disposing (a) all organic and inorganic chemicals derived from petroleum hydrocarbon elements, chemicals compounds and products of any nature and kind whatsoever including by-products, derivatives and mixtures thereof.

2.3 The authorized issued, subscribed and paid up share capital of the petitioner Company as on 31.3.2007 was as under:

	Rs	**Rs**
Authorised Share Capital		

	Rs	**Rs**
(i) 40,00,00,000 equity shares of Rs. 10/- each	400,00,00,000	
(ii) 40,00,00,000 Non-Convertible Redeemable Preference Shares of Rs. 10/- each	400,00,00,000	
Total		800,00,00,000
Issued Share Capital		
30,30,10,937 Equity Shares of Rs. 10/- each		303,01,09,370
Subscribed and paid up share capital		
30,07,02,798 Equity Shares of Rs. 10/- each	300,70,27,980	
Add : Shares Forfeited	82,72,495	
Total		301,53,00,475

2.4 In showing the profitability of the Company, audited balance sheet of the petitioner Company for the year ended 31.3.2006 is annexed along with the petition. The last unaudited financial accounts of the petitioner Company as on 31.3.2007 are also annexed with the petition.

2.5 The equity shares of the petitioner Company are listed on the Bombay Stock

Exchange Limited and the National Stock Exchange of India Limited. The Bombay Stock Exchange Limited vide its letter dated 13.3.2007 and the National Stock Exchange of India Limited vide its letter dated 14.3.2007 have issued their “No Objection” to the Scheme of Amalgamation.

FACTS OF THE TRANSFEREE COMPANY:

3. The Transferee Company was incorporated as Mynylon Limited on 8.5.1973 in the State of Karnataka under the provisions of the Act. The name of the Transferee Company was subsequently changed to Reliance Textile Industries Limited on 11.3.1977. The place of the registered office of the Transferee Company was thereafter changed from the State of Karnataka to the State of Maharashtra on 2.7.1977. The name of the Transferee Company was again changed to Reliance Industries

Limited on 27.6.1985. It appears that the address of the registered office of the Transferee Company is : 3rd floor, Maker Chambers IV, 222, Nariman Point, Mumbai 400 021, Maharashtra. The objects for which the Transferee Company has been established are set out in its Memorandum of Association. The main objects are reproduced hereinafter:

3.1 "To carry on the business of manufacturers, dealers, agents, factors, importers, exporters, merchants and financiers of all kinds of man made fibres and man made fibre yarns of all kinds, man made fibre cords of all kinds and man made fibre fabrics of all kinds, mixed with or without mixing, materials like woolen, cotton, metallic or any other fibres of vegetable, mineral or animal origin, manufacturing such man made

fibres and man made fibre products of all description and kinds with or without mixing fibres of other origin as described above, by any process using petrochemicals of all description or by using vegetable or mineral oils or products of all description required to produce such man made fibres."

3.2 The authorised, issued, subscribed and paid up share capital of the transferee Company as on 31.3.2007 was as under:

	Rs.	**Rs.**
Authorised Share Capital		
250,00,00,000 Equity Shares of Rs. 10 each	2500,00,00,000	
50,00,00,000 Preference Shares of Rs. 10 each	500,00,00,000	
Total		3000,00,00,000
Issued, Subscribed and paid up Share Capital:		
139,35,0,041 Equity Shares of Rs. 10/- each fully paid up	1393,50,80,410	

	Rs.	**Rs.**
Less: Call in arrears – by others	31,27,380	
Total		1393,19,53,030

3.3 The equity shares of the Transferee Company are listed in Bombay Stock Exchange Limited and the National Stock Exchange of India Limited. The Bombay Stock Exchange Limited vide its letter dated 13.3.2007 and the National Stock Exchange of India Limited vide its letter dated 14.3.2007 have issued their "No Objection" to the Scheme of Amalgamation. The GDRs representing the underlying equity shares of the Transferee Company are listed on Luxembourg Stock Exchange and traded on the PORAL Market of the United States National Association of Securities Dealers Inc and SEAQ (London Stock Exchange). The non-convertible debentures of the Transferee Company are listed on the Wholesale Debt Market segment of the National Stock Exchange of India Limited.

3.4 The petitioner Transferor Company (IPCL) is a leading Indian integrated manufacturer of petrochemicals products. Its primary products are polymers, fibre intermediates and chemicals. It operates three integrated petrochemicals complexes in India – a naphtha based cracker complex at Vadodara; a gas based cracker complex at Dahej; and a gas based cracker complex at Nagothane. The polymer business of the petitioner Company encompasses commodity plastic raw materials namely Polypropylene (PP), Polyethylene (PE) and Poly Vinyl Chloride (PVC).

3.5 The Transferee Company (RIL) is one of India's largest private Sector Industrial enterprises in terms of net turnover, total assets, net worth and net profit and is a fortune 500 Company. The transferee Company ranks amongst the world's top 10 producers for

most of its products. Over the years, the Transferee Company's strategy has been to build leading market share in the domestic market, pursue export opportunities, implement vertical, forward and backward integration and at the same time, to achieve economies of scale, focus on financial management and invest in infrastructure projects.

RE: AMALGAMATION OF TRANSFEROR COMPANY WITH TRANSFEREE COMPANY:

3.6 Both the Transferor Company and the Transferee Company decided upon the Scheme of their Amalgamation. The Board of Directors of the Transferor Company passed a Resolution at its meeting held on 10.3.2007 approved the said Scheme subject to obtaining of all requisite approvals, if any, of the appropriate authorities and subject to the approval of the High Court of Judicature at

Bombay and the High Court of Gujarat at Ahmedabad.

3.7 The Board of Directors of the Transferee Company (Reliance Industries Limited) has also passed a similar Resolution at its meeting held on 10.3.2007.

3.8 Accordingly, the Scheme of Amalgamation was prepared. The rationale for the Scheme is stated as under:

> "The amalgamation of the Transferor Company with the Transferee Company would, inter alia, have the following benefits:
>
> (a) Greater size, scale, integration and greater financial strength and flexibility for the amalgamated entity, which would result in

maximising overall shareholder value;

(b) Strengthening leadership in the industry, not only in terms of the assets base, revenues, product range, production volumes and market share, but also in terms of total shareholder return;

(c) The synergies that exist between the two entities in terms of the products, processes and resources can be put to the best advantage of all stakeholders;

(d) The amalgamated entity will have the ability to leverage on its large asset base, diverse range of products and services and vast pool of intellectual capital, to

enhance shareholder value;

(e) The amalgamation will result in increased financial strength and flexibility, and enhance the ability of the amalgamated entity to undertake large projects, thereby contributing to enhancement of future business potential;

(f) The integration of the manufacturing and other facilities of IPCL and RIL will contribute to enhanced global competitiveness for the amalgamated entity, thereby increasing its ability to compete with its peer group in domestic and international markets;

(g) The amalgamated entity will benefit from improved organizational capability and leadership, arising from the combination of people from IPCL and RIL who have the diverse skills, talent and vast experience to compete successfully in an increasingly competitive industry; and

(h) Cost savings are expected to flow from more focused operational efforts, rationalization, standardization and simplification of business processes, productivity mprovements, improved procurement and the elimination of duplication.”

3.9 The Transferor Company had filed an

application being Company Application No. 126 of 2007 before this Court. This Court (Coram: M.R. Shah, J) passed order dated 16.3.2007 giving directions for convening meetings of the equity shareholders, Secured Creditors, unsecured creditors of the applicant Company (Transferor Company). It was stated that at least 21 clear days before the meetings to be held as aforesaid, notices convening the said meetings, indicating the day, the date, the place and time together with a copy of Scheme of Amalgamation, copy of the Explanatory Statement required to be sent under Section 393 of the Companies Act, 1956 and the prescribed Form of Proxy shall be sent under Certificate of Posting addressed to each of the equity shareholders, secured creditors (including debenture holders) and unsecured creditors of the applicant company at their last known address. It was stated that Mr. Justice S.D. Dave (Retd.) and in his absence

Mr. Lalit Bhasin shall be the Chairman of the said meetings. The ancillary and incidental directions relating to the said meetings were also given by the said order.

3.10 The above referred meetings were accordingly held after issuing required notices and voting had taken place on the proposed resolution supporting amalgamation. Scrutineers appointed at the meeting had submitted their reports which are as under:

RE: SHAREHOLDERS' MEETING:

(a) Voted in favour of the resolution:

Number of members present (in person or by proxy) and voting	Number of votes cast by them	**%** of the total number of members present (in person or by proxy) and voting	% of total number of votes cast by them.
7632	20,37,73,286	97.04	99.89

(b) Voted against the resolution:

Number of members present (in person or by proxy) and voting	Number of votes cast by them	**%** of the total number of members present (in person or by proxy) and voting	% of total number of votes cast by them.
233	2,28,705	2.95	0.11%

(c) Invalid votes

Total number of members whose votes were declared invalid	Total number of votes cast by them
54	11,74,879

RE: SECURED CREDITORS (INCLUDING DEBENTURE HOLDERS) MEETING:

(a) Voted in favour of the resolution:

Number of secured creditors (including debenture holders) present (in person or by proxy) and voting	Value of Secured Debt of those present and voting (Rs. in crores)	**%** of the total number of Secured Creditors (including Debenture holders) present (in person or by proxy) and voting.	% of total value of Secured Debt of those present and voting.
51	355.34	100%	100%

(b) Voted against the resolution

Number of secured creditors (including debenture holders) present (in person or by proxy) and voting	Value of Secured Debt of those present and voting (Rs. in crores)	**%** of the total number of Secured Creditors (including Debenture holders) present (in person or by proxy) and voting.	% of total value of Secured Debt of those present and voting.
Nil	Nil	Nil	Nil

(c) Invalid votes

Total number of Secured Creditors whose votes were declared invalid	Total value (Rs. in Crore)
3	0.25

RE: UNSECURED CREDITORS' MEETING:

(a) Voted in favour of the resolution:

Number of unsecured creditors present (in person or by proxy) and voting	Value of Unsecured Debt of those present and voting (Rs. in crores)	**%** of the total number of Unsecured Creditors present (in person or by proxy) and voting.	% of total value of Unsecured Debt of those present and voting.
635	687.48	100%	100%

(b) Voted against the resolution:

Number of unsecured creditors present (in person or by proxy) and voting	Value of Unsecured Debt of those present and voting (Rs. in crores)	**%** of the total number of Unsecured Creditors present (in person or by proxy) and voting.	% of total value of Unsecured Debt of those present and voting.
Nil	Nil	Nil	Nil

(c) Invalid votes:

Total number of unsecured creditors whose votes were declared invalid	Total value (Rs. in crore)
4	Nil

3.11 Thus as per the report, the Scheme was approved by an overwhelming majority of secured creditors (including debenture holders), unsecured creditors, equity shareholders and the resolution was passed by members constituting more than a majority in number and representing more than three-fourths in value of the shareholding of the equity shareholders present and voting either in person or by proxy at the meeting.

3.12 Thus in view of the report of the Scrutineers, the Chairman, Justice S.D. Dave (Retd.), made a report dated 18.4.2007 which is at page 114 and reported the above results. The Chairman has also filed an affidavit in support of the said report. Shashikala Rao, Company Secretary of the Transferor Company also filed an affidavit verifying the petition.

PRESENT CONTROVERSY:

4.1 In view of the same, the Transferor Company filed Company Petition No. 93 of 2007 before this Court under Sections 391 to 394 of the Act in connection with the Scheme of amalgamation of the Transferor Company (IPCL) and the Transferee Company (RIL).

DETAILS ABOUT THE SCHEME:

4.2 Under the Scheme, the appointed date means 1st April, 2006 which has been mentioned in Part I Definitions and Share capital of the Scheme. Effective date is given in clause 1.3 which means the last of the dates on which the conditions referred to in Clause 18.1 of the Scheme have been fulfilled. Clause 1.12 defines the term “undertaking”. The word “undertaking” shall mean the whole of the

undertaking and entire business of the Transferor Company as a going concern, including all the assets and properties.

4.3 It also provides in part II clause 4 Transfer of undertaking. Clause 4.1 provides general transfer of undertaking; Clause 4.2 provides transfer of assets; Clause 4.3 provides transfer of liabilities. The Scheme also provides when the Transferor Company merges with the Transferee Company, the Transferee Company will issue new equity shares of the Transferee Company to the equity shareholders of the Transferor Company in the ratio of 1 (one) equity share of the face value of Rs. 10/- (Rupees ten only) of the transferee Company with rights attached thereto as mentioned in the Scheme for every 5 (five) equity shares of the face value of Rs. 10/- (Rupees ten only) each credited as fully paid up held by such equity shareholders or

their respective heirs, executors or as the case may be, successors in the Transferor Company. The ratio in which equity shares of the Transferee Company are to be issued and allotted to the shareholders of the Transferor Company is hereinafter referred to as the "Share Exchange Ratio"). The Scheme also provides for various other aspects namely new equity shares, obtaining of approvals, fractional entitlement, exemption from registration, scheme conditional upon sanction. In para III of General, Description of Companies, the rationale for the Scheme is given which I have quoted earlier.

4.4 After the aforesaid procedure in connection with convening the aforesaid meetings was complied with, the present petition for amalgamation was filed in April, 2007 seeking directions for publication of public notice of date of hearing. It is stated

in the petition that no investigation proceedings have been instituted and/or are pending in relation to the petitioner Company under Sections 235 to 251 of the Act.

4.5 This Court admitted the petition on 23.4.2007 and fixed its hearing on 19.6.2007. Pursuant to that order the petitioner Company has served notice to the Official Liquidator on 30.4.2007 and also to the Regional Director, Department of Company Affairs, Western Region, 5th Floor, “Everest”, 100, Netaji Subhash Road, Mumbai and for that purpose affidavit of service has been filed on 4.5.2007. The petitioner Company pursuant to the order of this Court, published the notice in Times of India 21.5.2007 and Gujarat Samachar, Ahmedabad and Vadodara editions, on 21.5.2007. The Company Secretary has also filed affidavit of advertisement dated 9.6.2007. Thus, the requisite affidavits

before this Court in compliance with the aforesaid order have been filed.

4.6 Pursuant to the aforesaid order, the Official Liquidator has filed report dated 18.6.2007.

4.6A That in view of the said order, the Official Liquidator had appointed one M/s. Malay J. Dalal, Chartered Accountants, for carrying out the investigation work of the Transferor Company. M/s. Malay J. Dalal, Chartered Accountants, after scrutiny of the books of accounts and affairs of the above Company have submitted their investigation report dated 4.6.2007 which has been annexed with the report of the Official Liquidator at Annexure-A.

4.6B In the meanwhile, the Official Liquidator has also written to the petitioner

Company requesting him to furnish certain particulars and informations regarding the affairs of the Company. The said Company accordingly has submitted the required details to the Official liquidator which is annexed with the report at Annexure-B.

4.6C The Chartered Accountants (i.e. Shri Malay J. Dalal) have considered Tax Audit, Income-tax, Sales-tax, Excise Duty, Professional Tax, Provident Fund / Superannuation / Gratuity / ESIC, Summarized financial position, year-wise summarized profit and loss account, details of transferee Company, advantages of amalgamation, salient features of the Scheme of Amalgamation. The Chartered Accountants have come to the conclusion that on the basis of their comments in the report and according to the explanations given to them and books of accounts produced before them, they report

that the acts and transactions of IPCL were conducted within the objects mentioned in the Memorandum of Association of the Company and that the affairs of the Company have not been conducted in a manner prejudicial to the interest of its members or the public interest.

4.7 Along with the report of the Official Liquidator, details of transferor and transferee Companies were produced and balance sheets of IPCL and RIL for the years 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006 were annexed.

4.8 The Official Liquidator has filed report dated 18.6.2007 before this Court. Along with the report, the Official Liquidator has annexed report of auditor Pricewaterhouse Coopers Private Limited and Ernst & Young Private Limited. Both these Chartered

Accountant firms are very reputed and eminent firms. The two Chartered Accountants firms have expressed their opinion as to the fair exchange ratio of equity shares on the proposed amalgamation of IPCL into Reliance Industries Limited on a going concern basis was produced.

REPORT OF THESE TWO AUDITORS (PRICEWATERHOUSE COOPERS PRIVATE LIMITED AND ERNST & YOUNG PRIVATE LIMITED:

4.8A They addressed a letter to both the Companies about the exchange ratio of equity shares. In para 2 of the said letter they have stated the procedures used in the analysis included such substantive steps as are considered necessary under the circumstances, including but not necessarily limited to certain aspects. They have also relied upon the information, data and explanations

detailed in paragraph 2 in the said letter for the purpose of determining the exchange ratio of the equity shares of RIL and IPCL in connected with proposed amalgamation. They have also valued the assets and liabilities of RIL and IPCL which were reflected in the balance sheet of the Company. For the purpose of determination of the exchange ratio, they have used financial and other information provided by the management of both the Companies. Along with the said letter they have also annexed Schedule-I which shows factors considered in determining the exchange ratio of the equity shares of both the Companies. In the earlier part they have given information and background of both the Transferor Company and Transferee Company and in paragraph No. 2 they have given what is **methodology**. They have adopted the method in valuing of the shares. They have considered the method of Net Assets Value, Earnings

Value, Market value and thereafter they have determined the value of the shares of both the Companies. They have also indicated that the market value of RIL has been computed by averaging the value and the volume of shares traded for the last three months. They have also stated that the market value of IPCL has been computed by averaging the value and the volume of shares traded for the last three months. Ultimately, they have given their opinion about exchange ratio.

4.8B Pursuant to the notice issued by this Court to the Regional Director, Shri P.L. Malik, Assistant Registrar of Companies, has filed affidavit dated 1.6.2007 (page 136) where he has stated that he is filing this affidavit as authorized by Regional Director, Western Region, Ministry of Company Affairs, Government of India, Mumbai. In the said affidavit it has been stated that the

petitioner may be directed to submit proof of filing of affidavit of publication of notice of final hearing of the petition. He has also annexed original/letter dated 31.5.2007 sent by the Regional Director, Western Region, Mumbai to the Registrar of Companies. This application has been filed in accordance with the directions of the Regional Director, Mumbai. Letter dated 31.5.2007 is produced at page 136C of the petition.

4.8C The petitioner has also filed affidavit dated 18.6.2007 of Shashikala Rao, Company Secretary of the petitioner Company. In the said affidavit it was stated that the petitioner herein has complied with the directions given by this Court. The scheme has been approved by the requisite majority of shareholders and creditors of the petitioner Company. The Regional Director has already given his no objection to the Scheme being

sanctioned by this Court. The said affidavit is at pages 137-142.

4.8D As the registered office of the Transferor Company is situated within the State of Gujarat the present petition is filed by the Transferor Company before this Court.

HEARING BEFORE THIS COURT IN THE PRESENT AMALGAMATION PETITION: (Arguments of Mr. K.S. Nanavati, Mr. Mihir Thakore, Mr. S.N. Soparkar, ld. Sr. Counsels)

The Companies Submissions:

5.1 Thereafter, the matter has been placed before this Court for hearing. Mr. K.S. Nanavati, learned senior counsel and Mr. S.N. Soparkar, learned senior counsel with Mr. Nandish Chudgar for the petitioner Company have stated that the present petition is filed by IPCL, Transferor Company seeking sanction

to the Scheme of Amalgamation of the petitioner Company to RIL. He further submitted that the procedure under Sections 391 to 394 of the Act has been complied with by IPCL. The Court ordered convening of separate secured creditors (including debenture holders), unsecured creditors. The Scheme of amalgamation of the petitioner Company has been approved by overwhelming majority of the present and voting in person including debenture holders and unsecured creditors. The Regional Director has submitted his report giving “No Objection” to the scheme of amalgamation.

5.2 The Regional Director has submitted his report giving his no-objection to the Scheme inter alia stating that the Scheme is not against the public policy. The Official Liquidator has also filed his report stating that by sanctioning the Scheme, the interest

of members and public at large would not be prejudiced. In addition, even Bombay Stock Exchange Limited and National Stock Exchange of India Limited have granted their no-objection to the Scheme as is required under Clause 24(f) of the Listing Agreement. Thus, the fact that these independent bodies, after scrutinizing the Scheme, have granted their no-objection, clearly shows that the Scheme is in compliance with statutory requirements and is NOT opposed to public policy nor is against public interest.

5.3 As regards the Transferee Company, as the registered office of the Transferee Company is situated within the State of Maharashtra, the Transferee Company has filed application before the Bombay High Court. Pursuant to the order of the Bombay High Court dated 16.3.2007 in Company Application No. 283 of 2007 filed by the Transferee Company, the

Transferee Company had held separate meetings of Equity Shareholders, the Secured Creditors (including Debenture-holders) and unsecured creditors of the Transferee Company on 21.4.2007. The Chairman of the said meetings has submitted his report before the Bombay High Court. The Transferee Company has also initiated process of filing a petition before the Bombay High Court. It was stated that the Scheme is subject to sanction of both the High Courts.

5.4 Mr. K.S. Nanavati, learned senior counsel has invited my attention to the fact that pursuant to the aforesaid order in proceedings initiated by the Transferee Company before the Bombay High Court, the Bombay High Court by its order dated 12.6.2007 has sanctioned the Scheme subject to the Scheme also being sanctioned by this Court (page No. 181 of the paper book).

5.5 Pursuant to the aforesaid proceedings particularly advertisement published in newspaper, several objectors have objected to the scheme of amalgamation. The nature of objectors are under:

5.5A Objection-I has been raised by ancillary industries who have established when IPCL was incorporated in the then remote village at Vadodara District as well as Raighad at Maharashtra.

5.5B SC/ST employees who were also employed earlier by IPCL in view of Article 16(4) of the Constitution of India have raised their objection in regard to the amalgamation.

5.5C Three Trade Unions, namely, IPCL Employees' Association, IPCL Employees' Union, and Petrochemical Employees' Union and other

Trade Union of Employees of IPCL have objected to the scheme on the ground that before the scheme was finalized, they were not consulted and heard. They were also not taken into confidence before the Scheme of amalgamation was initiated.

5.5D The workers and some employee-shareholders have also raised their objections, namely, the scheme of amalgamation is against the public interest and public policy. The amalgamation scheme ought not to have been sanctioned because there are hidden objects by the transferee Company.

5.5E The objectors have also raised contention that while sanctioning the scheme this Court must lift the corporate veil and look to the realities of the matter.

5.5F The objectors have also objected to

the share exchange ratio which has been determined by two Chartered Accountants firms that the same is not fair and proper and therefore the scheme ought not to have been sanctioned. The objector has also raised contention that the Companies have called combined meeting of secured creditors and debenture holders as the interest of debenture holders and secured creditors is different , the Companies ought to have held different meeting between them.

5.5G The objector has also objected that some of the proxies collected from the shareholders or employees are collected under compulsion and coercion and therefore the result in the companies depends upon the shareholders voting is thus vitiated.

5.5H As far as ancillary industries are concerned, the objection has been raised by

Mr. P.R. Thakkar who has been ably supported by Mr. Shalin Mehta, learned advocate. As regards SC/ST employees the objection has been raised by Mr. Ramnandan Singh before this Court. As regards workers are concerned, the objection has been raised by Mr. Girish Patel, ld. sr. counsel with Mr. Shalin Mehta and other objections have been raised by Mr. Shalin Mehta, learned advocate.

OBJECTION BY VARIOUS PARTIES: (by Shri P.R. Thakkar and Shri Shalin N. Mehta)

Ancillary Industries: (Argument of Mr. P.R. Thakkar, ld. Advocate supported by Mr. Shalin Mehta, ld. Advocate)

6. It may be noted that when the aforesaid matter was pending before this Court, Company Application No. 255 of 2007 was filed by Schon Plastics Pvt. Ltd.,

through its advocate Shri P.R. Thakkar with a prayer that this Court may be pleased to allow and admit their application and also order giving protection to the applicants and other ancillary industries to IPCL situated in Nagothane (Maharashtra) constituted and formed at the instance of IPCL. The applicants further prayed that this Court may not sanction the proposed amalgamation scheme unless IPCL would acknowledge before this Court the contractual liability emerging from the record they have produced and assures to fulfill the same as per the terms of the said contract. Pursuant to the tender notice issued in 1990 and letter of IPCL dated 20.12.1991. The said petition was filed on 6.5.2007. Similarly, Company Application No. 257 of 2007 was filed by Rachana Poly Pack on 10.5.2007 with similar prayer in Company Application No. 255 of 2007 filed by Schon Plastics Ltd., because both are ancillary

industries and they have prayed for similar relief.

6.1 In the said applications, the Company has also filed reply on 15.6.2007 as well as also filed reply in the main matter. Similarly in Company Application No. 255 of 2007 the Company has filed reply. In both these applications this Court passed order on 19.6.2007 to the effect that the Company Applications would be disposed of with the observation that the objections which were raised in the applications be treated as objections to the proposed scheme of amalgamation and the same shall be considered at the time of hearing of the main Company Petition.

Rachana Polypack and Schon Plastic Pvt. Ltd. -Objectors (Applicants in Company Application No. 255 of 2007)

Ancillary Industries – Project affected persons (applicants in Company Application No. 257 of 2007).

6.2 The IPCL is basically and originally Government of India undertaking establishing Petrochemical Industries in India.

6.3 The IPCL has plant at Nagothane (Maharashtra) in backward and tribal area.

6.4 The Ministry of Chemical and Fertilizer was managing and superintending the affairs of IPCL, who decided to have such industries in backward and tribal area of the nation, so that people of that area can be offered employment and other industrial benefits can be earned.

6.5 The IPCL at Nagathane, was required to

give employment to the project affected person (Tribal one and others). Hence decided to raise Ancillary Industries to be formed within 10 kms. radius. Hence tender notice dated 21/2/1992 inviting application for establishing Ancillary Industry for IPCL (Annexure-A, page-20)

Pre Conditions prescribed in Annexure-A

1. “Entrepreneur should be financially sound and technically competent.

2. Project affected people as per the IPCL's directives should be employed.

6.6 The applicant no.2 of Company Application No.257 of 2007, the employee of IPCL applied for the same and by duly constituted committee selected to be registered as Ancillary Industries. Hence,

the opponent IPCL issued the letter of intent dated 9/10/1992 (Annexure-B, page-25). Thus, the contract was entered into between the applicant and the IPCL, thereby as per clause 5 of (Annexure-A) tender notice and as per clause 2 of Annexure-B letter of intent, the IPCL is bound to give the purchase orders to the Ancillary Industries at least to the extent of 50% of the total production of the Ancillary Industries. The letter of intent the IPCL has clearly stated that they are declaring and registering the applicant company as Ancillary Unit to IPCL.

6.7 The Ancillary Industry is defined in Section 3(aa) of the Industries (Development and Regulation) Act, 1951 as under:

> "Ancillary industrial undertakings means an industrial undertaking, which in accordance with the proviso

> to sub-section (I) of Section 11-B and the requirements specified under that sub-section, is entitled to be registered as an ancillary industrial undertaking for the purpose of this Act."

6.7A The "Industrial Undertaking" is defined under Section 3(d) of the said Act, means any undertaking pertaining to a schedule industry carried on in one or more factories by any person or authority including government. And Schedule Industry means any of the industries specified in first Schedule of the said Act.

6.7B The proviso to Section 11(b) of the said Act provides that,

> "provided that no industrial undertaking said be regarded as an

Ancillary Industrial Undertaking unless it is, or is proposed to be engaged in, rendering of services of supplying or rendering, not more than 50% of its production or its total services, as the case may be, to other units for the production of other articles."

6.7C It is submitted that it is amply clear that to be an Ancillary Industry of opponent IPCL, the IPCL is statutorily bound to purchase the 50% of the production of the Ancillary Industry i.e. applicants.

6.8 The applicants, on the basis of the aforesaid agreement, were induced to invest more than Rs.60 lacs (by Rachana Polypack and huge amount by Schon Plastic Pvt. Ltd.) within six months as per terms of Annexure-A and B and established the Ancillary Industry to IPCL

by installing the plant machinery industrial shed etc. It is also pertinent to note that a special valve type bag which is highly technical and peculiar production was agreed to be produced as per the stringent specifications given by IPCL, which is one of the mandatory term of the contract. Therefore, a special type of plant and machinery were installed and the production of Ancillary Industry could not be usable to other customers as it was meet only standard for IPCL.

6.9 The applicant Ancillary Industries and other about four industries have employed project affected people to the tune of about more than 500 employees, which were otherwise the liability of IPCL. It is pertinent to note that by way of such agreement the said liability was shifted over the Ancillary Industries and thereby the IPCL has eaten the

fruits of the contract, by conveying to the World Bank, that novel way of providing livelihood to the tribal people (project affected people) by raising the Ancillary Industries to IPCL and thereby the establishment of industry causing the development of economy of nation and thereby ultimately the World Bank had extended its aiding hands to IPCL.

6.10 In June, 2002, the Government of India as a part of disinvestment program, divested 26% of its shares in IPCL in favour of Reliance Petro Investment Ltd. (RPIL). The associated of Reliance Industries Ltd. (RIL). Thereafter, RIL chosen to acquire other 20% shares from market. Shri Mukesh D. Ambani become Chairman of IPCL.

6.11 Thereafter IPCL started to commit breach and stopped to give the purchase orders

to Ancillary Industries. Hence initially approached to the Hon'ble Disinvestment Minister, while diverting initial 26% shares, where Shri Mukesh Ambani assured to survive the Ancillary Industries of Nagothane. Still however breach committed.

6.12 Hence writ petition before the Bombay High Court at Annexure-D, order of Bombay High Court at Annexure-E that relief claim can be prayed for either in civil court or by way of conciliation – mediation, arbitration. Thereafter, letter-Annexure-F for resolving dispute by arbitration as suggested by Bombay High Court.

6.13 Rachana Polytech of Company Application No.257 of 2007 has filed Special Civil Sit No.128 of 2007 (Annexure-J, page-81) against IPCL for specific performance of contract (Annexure-A and B), wherein

alternatively prayed for compensation / damages to the tune of Rs.3,41,21,000/-. The prayer is made in para 26 of the plaint at running page 117.

6.14 The applicant respectfully submits that the IPCL has not at all disclosed anything regarding such contractual liability in the proposed scheme of amalgamation. It is pertinent to note that so far as 500 project affected employees employed by Ancillary Industries are concerned, nothing has been stated in the scheme of amalgamation sought to be sanctioned by this Court. The opponent IPCL, virtually a commanding management of RIL, has chosen to commit the breach of the contract and chosen to destroy the entire Ancillary Industries with an ulterior motive to assign such job of production to their related persons. Thus, the transferee company would not honour the contract with Ancillary

Industries in as much as they collusively not all disclosed these facts in the proposed scheme of amalgamation. Not only that but they have not provided any thing in the scheme itself except to have a general statement that legal proceeding against the IPCL would be construed as proceeding against the transferee company. As per Section 394 of the Companies Act, the Court is empowered to make the provision while dealing with the issue of sanction of amalgamation scheme pertaining to the transfer to transferee company of the whole or any part of undertaking, property or liability of the transferor company and can also provide for implementing the order of Bombay High Court in real spirit so as to resolve the dispute either by Arbitration method or otherwise. Therefore, it is quite necessary in the interest of justice to impose the condition while sanctioning the scheme that the any contractual liability of IPCL

would be construed as if liability belongs to RIL i.e. transferee company and the suits pending against the IPCL in Vadodara Civil Court as well in Raigadh Civil Court required to be construed as if pending against the transferee company and transferee company is required to be directed to meet with the liability in future if any arise by way of decree to be passed by the concerned courts.

6.15 Attention of this Court is invited to the affidavit in reply filed by IPCL at page 121 in Company Application No.257 of 2007 wherein, in para 7, the opponent IPCL, has to some extent considered the position that the contract would be automatically get transferred to RIL upon the scheme being sanctioned but the opponent IPCL has chosen to deny the existence of the contract with Ancillary Industries. Such denial on affidavit is absolutely false one, in as much as the

opponent IPCL has admitted the existence of the contract on affidavit before the Raigadh Civil Court in a suit filed by Schon Plastic Pvt. Ltd. the applicant of Company Application NO.255 of 2007. Copy of the order passed below Exh.5 of Raigadh Civil Court is produced while arguing this Company Application and pointed out by reading para 27 of the said order wherein the learned Judge has found in the following manner.

> “If written statement Exh.21 is looked into, the defendant admit that on various terms and conditions stated in the letters written by the defendant to the plaintiff, the plaintiff was registered as Ancillary Unit in the year, 1991. However, at no point of time plaintiff was given status of permanent or perpetual unit.”

6.15A Thus, the IPCL have admitted the existence of the contract before the Raigahd Civil Court, while before this Court in affidavit in reply in para 7, the IPCL chosen to deny the existence of the contract (page no.123, para-7).

6.16 The IPCL has not made any provision either to award retrenchment compensation to the Ancillary Industry for project affected employees, employed by the Ancillary Industries to the tune of about 500 and there is absolute non disclosure of the said in the scheme.

6.17 The learned advocate has invited the attention of this Court that applicant of Company Application No.257 of 2007, the Rachana Ploypack filed suit for specific performance of the contract and for compensation before the Vadodara Civil Court,

by applying Section 19 and 20 of Code of Civil Procedure. It is pertinent to note that the applicant has got statutory rights under the said Section of CPC to file a suit against the defendant IPCL at the place, where the principle/registered office of IPCL is situated namely at Vadodara or can file a suit at the place where cause of action has been arisen. In the instant case the applicant has chosen to file a suit at Vadodara Civil Court, as the Principle/registered office of the IPCL is situated at Vadodara and thereby by considering to explanation to Section-20 the suit is maintainable within the jurisdiction of Civil Court at Vadodara. There are all possibilities that after amalgamation as the existence of the IPCL would be abolish and as the principle office of the transferee company is situated at Bombay, the transferee company may take a contention before the Civil Court, Vadodara that in view of Section 20 of CPC,

the Bombay Court would have only the jurisdiction as the registered office is now not situated at Vadodara. Thus, there are all likelihood to pluck away the statutory rights of applicant, namely right to file a suit at a particular place namely at Vadodara against the IPCL, having its principle office at Vadodara. Thus, the scheme of amalgamation, which take away the statutory right of any litigant, cannot be sanctioned or the Court is empowered under the provisions to protect such statutory rights of the applicant.

6.18 Thus, considering the aforesaid submissions, it is submitted to this Court either to reject the scheme of amalgamation or be kind enough to protect the Ancillary Industries from being destroyed by IPCL or RIL and be pleased to make a provision for protecting the contractual interest of the Ancillary Industry and/or the litigation

pending between the Ancillary Industry and IPCL and be pleased to provide for protection of 500 project affected employees, employed by Ancillary Industry, which were and are otherwise the liability of IPCL and be pleased to further protect the jurisdiction of Vadodara Civil Court by holding that, if otherwise the Vadodara Civil Court has jurisdiction then the transferee company cannot raise the contention of jurisdiction on the ground that the principle office of RIL i.e. transferee company is at Bombay and not at Vadodara.

OBJECTION ON BEHALF OF SC/ST EMPLOYEES – BY SHRI RAMNANDAN SINGH, LD. ADVOCATE:

7. Mr. Ramnandan Singh, learned advocate, submitted that there are about five members

who belonged to SC/ST category who were working in IPCL who have made representation on behalf of all SC/ST employees. He submitted that when IPCL was a Company it was a Government of India undertaking and in view of Article 16(4) of the Constitution of India, IPCL used to make some resolutions of employees in category of Scheduled Castes/Scheduled Tribes. That continued upto 2002 when the Company was working and thereafter due to demerger reliance took over 26% share of the Company. Even thereafter also Resolution in favour of SC/ST was continued.

7.1 However, when they felt that IPCL is going to be merged with Reliance Industries Limited, Transferee Company, they filed Special Civil Application No. 10045 of 2007 and prayed for certain directions. When the matter reached hearing before this Court, this Court passed order in 8th May, 2007 with

direction that SC/ST persons should make representation to the Secretary, Ministry of Chemicals & Petrochemicals, New Delhi and the Secretary, Ministry of Finance – Department of Disinvestment. The learned advocate has submitted that accordingly they already made representation dated 5.6.2007 to both these authorities. He has produced some of the documents. The learned advocate has to file a short affidavit putting those facts on this record. He has prayed that some time may be granted. The prayer is granted. He therefore submitted that whatever arrangement and agreement which was entered into between IPCL and SC/ST employees right from 1969 which was continued till today, the same may be continued. He further submitted that whatever order the Central Government passes in the representation which they filed before the Government of India, the said final order will be binding to the Transferee Company.

WORKERS' SUBMISSIONS: [Submission of Mr. Girish Patel, ld. sr. advocate]

8.1. As regards Company Application No. 260 of 2007, the same is filed by IPCL Employees Association and IPCL Employees Union. All the applicants are Trade Union of Workers working in IPCL with a prayer to direct the Managements of the Transferor Company and the Transferee Company to hold consultations / discussions / negotiations with the applicants on the issues highlighted by the applicants vide their letter dated 10.4.2007. In support of the same affidavit of senior Vice President of the applicant No. 1 Association has been filed. In this matter this Court passed order on 19.6.2007 that the present application be treated as objection to the scheme.

8.2. The present Company Application (Company Application No. 260 of 2007) involves the question of fate of about 5000 employees / workmen who have served in the IPCL (Transferor Company) for the last 20 to 30 years, facing the sudden disappearance of their Company and their absorption in Reliance Industries Limited (Transferee Company), a new entity under a different master. The central question raised by the applicants is what is the scope for concern for the workers/employees of the Company or Companies in any scheme of arrangement, amalgamation, compromise etc. within the purview of Sections 391 to 394 of the Companies Act, 1956.

8.3. Company Petition No. 93 of 2007 is filed by the IPCL praying for sanction of the Court for the scheme of amalgamation of the IPCL Company with Reliance Industries Limited. The IPCL is a leading profit making

enterprise. Originally, it was Government of India enterprise, a leading public sector undertaking which was acclaimed as one of the Navratnas. However, as a result of the disinvestment of the Company in about June, 2002, the Reliance Petro-Investment Limited (strategic partner), an associate Company of the Reliance Industries Limited has acquired at present shares of 46.57% in the IPCL. It must be noted that IPCL is a profit making enterprise and did not and does not face any financial problems at the time of proposed amalgamation. Similarly, the Reliance Industries Limited is one of the largest private sector industrial enterprise in India and ranks among world's top 10 producers for most of the products. It can be considered as a giant globalised corporation.

8.4. It is submitted that the basic features of the proposed scheme of

amalgamation are enumerated on page 8 of the Company Petition and the Scheme is reproduced on page 49 (Annexure-G of the Company Petition). As per this Scheme, the appointed date is 1.4.2006. Clause 1.12 defines “undertaking” so as to include “all employees engaged in or relating to transferor Company's business and operations”. Clause 4.1 provides for transfer of undertaking of the transferor Company as a going concern with all assets, liabilities, obligations and employees. Clause B(a) deals with rationale for the Scheme namely, to achieve more efficiency, economy, benefit of scale, higher productivity, rational allocation and utilization of the resources, etc. However, Clause B (Government) reads as under:

> “The amalgamated entity will benefit from improved organization capability and leadership, arising from the

combination of people from IPCL and Reliance Industries Limited who have diverse skills, talent and best experience to compete successfully in an increasingly competitive industry (pages 18 & 19 of the Company Petition). Clause 7.2 imposes restrictions upon IPCL in the meanwhile (page 68). Clause 8 specifically deals with the employees of IPCL (pages 13 & 70 of the Company Petition). Clause 13 provides for dissolution of IPCL without winding up."

8.5. The question raised by the Unions is whether did the workers stand in the new amalgamated Company as erstwhile workmen of the IPCL (Transferor Company) and as employees absorbed in the Reliance Industries Limited (Transferee Company).

MAIN CONTENTIONS OF THE WORKERS:

9.(1) The workers being a very important part of a going concern, namely, IPCL, have a right to be consulted or to be taken into confidence (evidence) or who have participated in the amalgamation proceedings going on between the two Companies. In the present case, the workers are not involved at all in the proceedings by the IPCL. Not only that but even they were never informed nor given any opportunity nor was there any response to the written grievances given by the workers of IPCL.

9.(2) The Scheme amalgamation in question does not even mention the right or freedom of workers regarding the option whether to join the transferee Company or not. Their main question is if any workman is not interested in joining the Reliance Industries Limited (Transferee Company) what would be the nature

of his refusal? Would it be resignation, termination, or retrenchment? The scheme and the prayer made by the Company before the Court simply provides that the workers of IPCL shall become the workers of the Reliance Industries Limited on the granting of sanction. This amounts to treating the workers as simply chattels who can be shunted from one place to other.

9.(3) Even if the IPCL clarifies that the workers have freedom not to join the Reliance Industries Limited, this option is in fact illusory as the workers have worked with IPCL for the last 20 to 25 years and at this stage, they cannot get out and do not have good prospects for any alternative employment. The plight of the workers at this stage makes it more important and necessary for conclusion with the employees by the IPCL when the scheme of amalgamation is proposed and

negotiated.

9.(4) As the workers of IPCL are directly affected by the Scheme of amalgamation and when by virtue of the scheme the employees of IPCL will become the employees of the Reliance Industries Limited and when the prayer of the IPCL before the Court in its Company Petition is for an order of the Court to declare that the employees of IPCL will become the employees of Reliance Industries Limited, in other words when they asked for the order of the Court to this effect, the workers have every right to raise objections and come before the Court and there can be no objection against the right of the workers who appear in the Court and object in any scheme of amalgamation, the workers have a locus standi to object to the scheme either in whole or in part.

9.(5) The existing rights and interests of the employees of IPCL with inbuilt potential development or growth have not been properly considered, discussed and protected. Mere clause 8 in general terms does not satisfy the grievances of the workers.

9.(6) That part of Clause 8 which is described by the IPCL as only clarificatory is absolutely obnoxious, unjust and confiscatory of the rights of the workers. The IPCL which is the employer of the workmen has no business to tell the workmen that even though he becomes the employee of Reliance Industries Limited, he will not be entitled to any scheme of employment or other benefits available to the employees of Reliance Industries Limited.

9.(7) The workers of IPCL may not perhaps claim that there must be guarantee against future events but have every right to raise

questions regarding the immediate impact of the transfer of employees from IPCL to Reliance Industries Limited and they have not been sufficiently taken care.

9.(8) The specific concerns expressed by the workers of IPCL before IPCL and before the Court can be taken of and ought to be taken care of at the very stage of amalgamation and for these grievances, they cannot be compelled to wait for complete amalgamation and avail of alternative remedy like Labour Court etc.

9.(9) If the legitimate rights and interests of the workers of IPCL have not been fairly, reasonably, and justly considered, that part of the Scheme is definitely against the public interest and public policy.

THE LEARNED SR. COUNSEL'S FURTHER SUBMISSION:

10. It is submitted that the principal contentions of the applicants on behalf of the workers of IPCL should be understood and appreciated in the context of the development in the sphere of corporate system, Company Law and World Economic System. It is, therefore, submitted that while dealing with the contentions of the workers, the following aspects are very important.

10.1 One of the central questions of Company Law discussed in the various countries and in India:

10.2 Have workers no place in the affairs of the Company except as sellers of wage labour? Are they considered as dead assets to be treated like machines, goods, buildings, contracts, assets etc. or are they required to be treated as living human beings who spend large number of years with the Company?

10.3 The important distinction between labour and capital (capital coming from shareholders and creditors) is that in the case of capital, the owner can be separated or delinked from the capital but in the case of labour, their physical and mental labour cannot be separated from human personality. A company is not merely purchasing wage labour but is engaging a total human being.

10.4. It is also recognized that a modern corporation or a company is not a business enterprise working for profits only but is a living social institution and integral part of socio-economic life of the community and therefore its birth, death, success or failure, working methods, operations, and dealings have wild repercussions in the society and are not confined to the economic interest of those who have supplied capital.

It is also recognized that a modern corporation has to recognize, respect and promote not only the interest of shareholders or creditors but of different classes of people in the society. The important elements of modern corporation are promoters, shareholders, creditors, directors, manager, workers, consumers, State, society and the world. For example, the Company Law has to tackle the problems of shareholders' genuine democracy and workers' participation in the management.

10.5 In the age of new economic policy viz., liberaliation, privatization, and globalization and in the light of the rise of giant model, national and multi-national, the working and dealing of these Corporations cannot be completely left to themselves and cannot be considered as purely internal matters of the Corporation and their Directors

and shareholders. These Corporations are in the modern world very important centres of private power – sometimes more powerful than the States themselves. Therefore, the question of social responsibilities of the modern Corporation and the availability of the basic human rights against these Corporations known as non-State actors are the burning problems of new International Law of Human Rights and Constitutions in many countries.

10.6 It is also recognised that a modern enterprise is the result of combined efforts of labour and capital. One cannot work without the other and therefore they are considered as almost partners in the business enterprise. Both equally contribute to the productivity of the company and its development and therefore equal status of both is recognized and must be recognized by the dynamic Company Law. Just as shareholders claim that “X” or “Y” is their

Company, the workers also have a legitimate right to claim that “X” is their Company. In fact, the workers are much more important than capital because as living human beings, they spent the most fruitful years of the life with the Company. Their very existence, their life, their identity, their personality and their future are intimately connected with the Company's life. Shareholders ultimately in the modern world are considered as mere passive recipients of dividends and nothing more. While the workers' life and every day of the working years are associated with the working of the Company. It is, therefore, submitted that the very life and death of the company are of great importance to the workers and therefore the workers in a Company Law cannot be totally ignored.

10.7. Even the Constitution of India and the statutory laws of the country have also

recognized the rights and interests of the workers in a modern corporation and society.

(a) Art. 43A of the Constitution of India provides *"the State shall take steps, by suitable legislation or in other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry".* This is one of the Directive Principles of the State Policy and is declared to be a fundamental principle in the governance of the country and is equally of importance to the Courts administering justice.

(b) The Hon'ble Supreme Court of India has also interpreted Article 21 of the Constitution of India, right to life as right to know merely to existence

but right to live with human dignity and has included a number of Directive Principles of State Policy as the constituent element of right to life. One of these is the empowerment of the workers. How workers are treated by their Company and by the Company Law is certainly a matter of human dignity and no one can be a party to any practice or rules which are derogatory to the dignity of a human being.

(c) He submitted that Articles 39 of the Constitution of India provides certain Directive Principles of State Policy to be followed by the State, namely that men and women equally have the right to an adequate means of livelihood; that the ownership and control of the material resources of the community are so distributed as

best to subserve the common good; that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment and others. Article 41 provides right to work, to education and to public assistance in certain cases by the State. Article 42 provides provision for just and humane conditions of work and maternity relief. Article 43 provides living, wage, etc. for workers. Article 46 of the Constitution of India provides promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker Sections. All these Articles lay down various essential rights of workers which are considered to be the constituent element of right to live with human dignity in various

judgements of the Hon'ble Supreme Court.

(d) He has also invited the attention of this Court to the provisions of the Industrial Disputes Act, 1947 particularly Section 3A which has been introduced by Gujarat 21 of 1972 with effect from 20.1.1973 which provides Joint Management Council. Section 3B provides functions of the Council. The said amended Section 3A provides for establishing Joint Management Council representing the employer and the workers and has tried to implement Article 43A by way of statutory provisions securing workers' participation in the management.

(e) Even Chapters 5-A of the I.D. Act provides for lay off and retrenchment

and 5-B provides for special provisions relating to lay off, retrenchment and closure in certain establishments. The said Chapters 5A and 5B of the I.D. Act have made specific provisions with respect to the power of the management to effect lay off and to retrench the workers or to close down the industry. These are the co-issues of the traditional right of the management but the Act has also intruded into the realm of managerial prerogative by prescribing the necessity of prior permission before any such actions taken by the management.

10.8 It is, therefore, submitted that while interpreting Sections 391 to 394 of the Companies Act, and particularly the workers concerned in the scheme of amalgamation

between two Companies, the Companies themselves and the Court and to take into consideration these latest developments in the world of Company Law particularly towards participatory management on the part of the workers and humanization of law.

10.9 The learned advocate has relied on the following decisions:

(1) MUNICIPAL COUNCIL , DAMOH VS. M/S. VRAJ LAL MANILAL & CO. reported AIR 1982 SC P. 844 (paras 47 and 48)

(2) SUBHASH CHAND JAIN VS. DELHI ELECTRIC SUPPLY UNDERTAKING & OTHERS reported in AIR 1981 SC 75 (paras 4, 6, 8 and 92)

(3) GUJARAT KAMDAR SAHAKARI MANDAL AND OTHERS VS. RAMKRISHNA MILLS LTD. (1998) 92 Company

Cases pages 692 & 711.

THE ROLE OF THE COMPANY UNDER SECTIONS 391 TO 394 OF THE COMPANIES ACT:

11. The different leading judgements of the Hon'ble Supreme Court and the High Courts have specifically dealt with and determined the specific role of the Company Court while granting sanction to any scheme of arrangement, compromise and amalgamation in relation to a company under Sections 391 to 394 of the Companies Act. The basic principles which emerged from these judgements are as under:

11.(1) Under Sections 391-394 of the Companies Act, in the case of arrangement, compromise and amalgamation in relation to a company, the application can be made only by the shareholders or creditors.

11.(2) If in such scheme the sanction of the Company Court is a mandatory requirement.

11.(3) Unlike United Kingdom, the Scheme of amalgamation is not left to the shareholders and creditors but the law recognizes the importance of concerns over and above the interest of shareholders and creditors and their monetary interest.

11.(4) It is also established that the Company Court is not merely a rubber stamp or a registering authority but has an independent supervisory role to ensure that all statutory requirements are complied with, that the scheme is just, fair and reasonable which prudent business management would approve, and the scheme is not opposed to public policy or public interest.

11.(5) Therefore, the Companies Court has a dual role (1) as an umpire to ensure that the claim is fairly played and is not guided merely by the simple majority role, all interests are properly considered and consulted and represented; and (2) as protector of public policy or public interest.

11.(6) Though it is recognized that the Company Court does not have appellate power while sanctioning the amalgamation scheme but only supervisory power, this supervisory power as is pointed out above is not merely power of rubber stamp or registering amalgamation scheme. Supervisory power is itself an important power of the Court.

11.(7) Moreover, this power of the Court is not merely one-time supervision but even continuous supervision to see that the compromise or arrangement is carried out

under Section 392, the Court has got power to give directions or make suggestions in the scheme as it may consider necessary for the proper working of the compromise or arrangement. And this power can be exercised by the Company Court not only at the time of sanction but also at any time thereafter.

WORKERS' POSITION AND STATUS IN THE PROPOSED SCHEME OF AMALGAMATION:

12. It is submitted that the workers of the Company or Companies proposing any scheme of amalgamation and praying for Court's sanction have an important role to play.

12.(1) A scheme of amalgamation is not a unilateral scheme or action by one company only like internal organization or arrangement but as a result of agreement between the Transferor Company (IPCL) and the Transferee

Company (Reliance Industries Limited). It is in fact an agreement between the shareholders and creditors of both Companies and the terms and conditions of the scheme are the subject matter of negotiation between the two Companies and are not dictated by one company alone. Both Companies jointly work out the proposed scheme and then, after securing the consent of necessary parties, approach the Court for sanction. If this is the situation, the workers of the Transferor Company, (IPCL) can become a topic of mutual discussion not merely by Transferor Company but also by Transferee Company. In such mutual agreement of transfer between two companies, the workers of one Company cannot be totally ignored or excluded. And there is no statutory prohibition in the Companies Act excluding the workers completely from participation in the proceedings. The fallacy of the judgements arises from the defective approach to consider

the scheme as if it is a unilateral act by the transferor Company.

12.(2) Once the Company presents the scheme of amalgamation before the Company Court and once the Company Court grants sanction, the scheme does not simply remain an agreement binding upon those who agree but becomes binding upon all whether they agree or not. Therefore, while sanctioning the scheme of amalgamation if the Court would perform the role of sanction, the Court can very well consider the concerns interests and rights of the workers of the Company.

12.(3) As a result of the amalgamation, the undertaking of the transferor company is completely transferred to the transferee company and this undertaking will also include all its workmen and secondly the transferor company will be dissolved without being wound

up.

12.(4) As a result of amalgamation, the transferor Company will completely cease to exist and its identity is completely lost and after amalgamation, the transferee company becomes a new entity as a result of combination of both the Companies. It will have new identity, new structure, new set up and it will have a clear and large impact upon the workers of the Transferor Company because the employer of the employees goes out and the employees get a new employer under whom they have to work. As they are not merely passive absence recipient of dividends or claims of their credits and interest but they have to work with new company, they are vitally interested in their position in the new set up.

12.(5) If the scheme of amalgamation is

considered and the Company Petition is looked at, the employees of IPCL will become directly the employees of Reliance Industries Limited and this will be not by virtue of the agreement of the workers but by the scheme of amalgamation undertaken by the two companies and by virtue of the sanction to be given by the Court.

12.(6) It follows that if this is going to be the impact of amalgamation upon the employees of IPCL, they cannot be treated like chattels to be bought and sold at the whim of the employer nor can they be treated like slaves.

12.(7) The scheme of amalgamation is ultimately a scheme of rationalization of the organizational and operational system of a company and right from the beginning, the matter of rationalization always involves the conflict between the employer and the workers.

While the employers want flexibility, freedom of action, desire for rationalization and economy, restructuring and reallocation, diversion of resources from one area to another area, mere economic and rational utilization of resources etc., the workers always are interested and demand reasonable security of service, steady and increasing wages, reasonable protection against insecurity and uncertainty etc. Traditionally, the former is put in the realm of Company Law and the latter is always included in the sphere of Industrial Law, as it is rightly said that managerial prerogatives under the Company Law are tampered with insurgency of the labour.

12(8) It is therefore submitted that the Company Court dealing with any question regarding Company Law and particularly the scheme of amalgamation ought to consider the

different laws operating in the field and reconcile the conflicting interest and create a balance, as it is said the law is a science of social engineering.

12.(9) As the Company Court is statutorily concerned with the public interest aspect of the scheme of amalgamation, the workers' interest also must be considered because (1) the interests of the workers constitute a part and parcel of fair, just and reasonable scheme and part of public policy (2) public policy or public interest does also include workers' interest who represent a significant section or segment of the company (3) public policy also includes constitutional policy and while discussing the question of public policy, the Court also has to keep in mind the constitutional policy as declared in the Preamble Part III (fundamental rights) and Part IV (Directive Principles of State Policy

and Part-IVA (fundamental duties). Participation of workers in the management, workers' dignity and workers' rights are therefore a part and parcel of constitutional policy and the Company Court, a part of the High Court, cannot ignore this constitutional policy, (4) even a prudent business management test does require serious and sensitive concern for the interest and rights of the workers because the satisfaction and welfare of the workers is an essential part of sound management policy. Discontent, disgruntle, alienated and segregated work force cannot be considered to be in the interest of enterprise. The scheme of amalgamation between IPCL and Reliance industries Limited has discussed the rationale of amalgamation. Clause B(g) on page 18 of the Company Petition refers to one advantage viz. “The amalgamated entity will benefit from improved organization capability and leadership, arising from the

combination of people from IPCL and Reliance Industries Limited who have diverse skills, talent and best experience to compete successfully in an increasingly competitive industry”.

12.(10) The simple question of the workers of IPCL (Transferor Company) is therefore that if the Reliance Industries Limited (Transferee Company) is going to have the benefit of diverse skills, talent and experience of IPCL employees which will be used in the transferee Company, why can their interest (i.e. workers) be not considered at the stage of amalgamation even with regard to the transferee Company. If the Transferee Company, Reliance Industries Limited is going to have the benefit of the employees of the IPCL, it must also be prepared to accept the responsibility towards these workmen and assured in the scheme itself.

12.(11) The relevant judgements covering the interest of workers are:

(1) PANCHMAHALS STEEL LTD. VS. UNIVERSAL STEEL TRADERS reported in 46 Company Cases 706 (Coram: D.A. Desai, J)

(2) In re HATHISING MANUFACTURING COMPANY LTD. (IN LIQUIDATION reported in (1976) 46 Company Cases p. 59 – p. 66 (D.A. DESAI, J)

(3) MANSUKHLAL VS. M.V. SHAH, OFFICIAL LIQUIDATOR, LIQUIDATOR OF HATHISING MFG. CO. LTD., (IN LIQUIDATION) AND OTHERS reported in (1976) 46 Company Cases 279 (D.A. DESAI, J)

(4) HINDUSTAN LEVER EMPLOYEES UNION VS. HINDUSTAN LEVER LTD. & OTHERS reported in (1995) 83 Company Cases p. 30 – p. 39 (SC)

(5) GUJARAT NYLONS LTD. reported in 1992(1) GLH p. 637

(6) In re NARMADA CHEMATUR PETROCHEMICALS LTD., unreported judgement in Company Petition No. 147 of 2006 decided on 9.1.2007 by this Court (Coram: M.R. Shah, J).

(7) BLUE STAR LIMITED (2001) 104 Company Cases p. 371.

12.(12) It is submitted that the first three cases, namely, PANCHMAHALS STEEL LTD. VS. UNIVERSAL STEEL TRADERS (supra); In re HATHISING MANUFACTURING COMPANY LTD. (IN LIQUIDATION) (supra); MANSUKHLAL VS. M.V. SHAH, OFFICIAL LIQUIDATOR, LIQUIDATOR OF HATHISING MFG. CO. LTD., (IN LIQUIDATION) AND OTHERS (supra) show concern for the workers while the latter cases, namely, HINDUSTAN LEVER EMPLOYEES UNION VS. HINDUSTAN LEVER LTD.

& OTHERS (supra); GUJARAT NYLONS LTD. (supra); In re NARMADA CHEMATUR PETROCHEMICALS LTD. (supra); BLUE STAR LIMITED (supra) deal with the rights and interest of the workers in the transferor Company. It is submitted that these later cases have considered the interest and welfare of the workers as one of the concerns of the Company Judge and in a given case, they have held that the particular clause takes care of the workers' interest but ultimately the Court was concerned with the fair treatment and what is fair treatment or what are the standards of fairness cannot be mechanically laid down and have not been laid down by any of the judgements. If the judgements are read as a whole, the Court's consideration of the clause regarding protection of existing rights and the statements made by the Companies' lawyers regarding assurance to the employees, it might satisfy the requirement of fair treatment in

that case.

12.(13) It is submitted that thus while considering the question of fair treatment to the workers, various aspects have to be considered and fair treatment is not a strait-jacket formula to be applied mechanically. Ultimately, it depends upon the facts and circumstances of the case.

The grievances and demands of IPCL before the IPCL (Transferor Company) and before this Court:

EFFECT OF SCHEME ON WORKERS:

13.(1) It is submitted that as the scheme of amalgamation of IPCL with Reliance Industries Limited will have a deep and pervasive impact upon the position and status of employees of

IPCL and as the employer of the workers will be changed from IPCL to Reliance Industries Limited, and as by virtue of the scheme itself and the order of the Court, the employees of the IPCL will become the employees of the Reliance Industries Limited, the employees of IPCL have clear legal standing or locus standi to object the scheme of amalgamation. Secondly, the statutory provisions of the Indian Companies Act do not specifically and explicitly or even by necessary implication prohibited the standing of the workers in such proceedings under Sections 391 to 394. It is strange that the transferor and transferee companies pray for forcible transfer of workers of IPCL to Reliance Industries Limited and yet they challenged the very standing of the workers to object the same. This Court's (Coram: M.R. Shah, J) judgement mentioned above specifically recognizes the locus standi of the workers. The Bombay High Court in

KAMANI EMPLOYEES UNION case reported in (2000) 1 Company Law Journal p. 351 specifically recognized the right of the workers and locus standi of the workers and various other judgements cited while considering objections of the workers except the standing of the workers.

13.(2) It is further submitted that by virtue of Clause 8 of the Scheme, the employees of the IPCL from effective date shall directly become the employees of Reliance Industries Limited and similarly the Company Petition of IPCL also prays for the order of the Court to make the employees of the IPCL employees of the Reliance Industries Limited. The Scheme does not even whisper about choice of freedom of the workers. It is well recognized (referring to the decision in the case of NOKES AND OKES VS. DONCASTER AMALGAMATED COLLIRIES (11 Company Cases 83)

and JAWAHARLAL NEHRU UNIVERSITY VS. K.S. JAWATKAR reported in AIR 1989N SC 1577) that the workers of one employer company cannot be forcibly transferred to another employer or employee company. This will be nothing but bonded labour or slaves. This also shows the approach of the Companies towards their employees. When the Company is transferring its employees to another employer, the Company does not have even courtesy to ask them whether any of them would like to join the new company or not. It is not a question of only choice but it is a question of dignity of the person himself.

13.(3) As a result of this absence of choice or option, the workers have a legitimate concern viz., if any worker does not want to join a new company, what will be the nature of his refusal or unwillingness? Would it be abandonment of job, resignation, termination

or retrenchment, the workers' right depend upon the answer to this question and suppose the workers refuse to join and if it is treated as retrenchment, who will pay the retrenchment compensation, whether IPCL or Reliance Industries Limited.

13.(4) It is submitted that the scheme is totally silent on this aspect and therefore is defective.

13.(5) It is true that even if the scheme provides for option whether to join or not to join the transferee Company viz. Reliance Industries Limited, the option will definitely be illusory for most of the workers because it takes away their very means of livelihood. The employees have worked with IPCL for 20 to 25 years and after such long service and at middle age, it is absolutely unjust and cruel for the Companies not to worry about their

future. The workers cannot easily ge out and seek jobs in the economy of unemployment. Therefore, from both the points of view, viz., silence about the scheme of option recognizing in principle the very dignity of the workers and their freedom and the unfortunate reality of unemployment which unwilling workers will have to face, the scheme is unfair, unreasonable and unjust as it fails to take into consideration the serious concerns of what can be described as captive workers. It amounts to nothing less than exploitation of and blackmailing the workers. This inequitable part has to be considered.

13.(6) It is submitted that considering the absence of option offered by the Company on the event of amalgamation and the illusory character of option if given, it follows that the workers of IPCL are entitled to be consulted in the process of negotiations of

the amalgamation. In the present case, the workers have never been informed about the proposed scheme of amalgamation, they have never been given any details of the same, they have been kept far away from the negotiation proceedings, they have never been given notice regarding the same nor the opportunity to represent the case and never allowed to participate. The workers' submission is that not only that they have right to come to the Court by raising objection to the scheme after scheme is finalized but they have also right to make representation and to be involved when the scheme itself is considered by both the Companies. This is the very essence of fair treatment. It may be that the workers' demand may not be considered fully or partly but that cannot exclude the workers totally from the negotiating table. The scheme must be fair, just and reasonable and in law and aspect which is more important even then the content

of the scheme is the procedural aspect viz., participation of the workers in the process. In other words, the aspect of rational decision making process.

13.(7) This participation of the workers before the stage of amalgamation is required for two reasons – (1) the right of human dignity demands it – what is known as intrinsic value of natural justice in the wider sense of participation and (2) the workers having long experience and skills can definitely contribute more significantly to the nature of the scheme and the advantage of the transferor Company in any scheme of amalgamation and particularly in the bargaining process. And this contribution of the workers who are inside the Company for the last 20 to 25 years will be of greater value when the participation of the exclusive shareholders and dividend seeking creditors.

13.(8) It is submitted that these two contentions of the workers, viz., their demand for being heard by the Court itself and their demand for being consulted by the Company itself are totally different from each other. The first is the question of natural justice before the Court, the second concerns the right of broad participation of the affected persons in the decision making process by the company itself. The present proceedings have denied the workers both the things.

13.(9) It is submitted that as the employees of the IPCL have served the Company for a long period and the IPCL is benefited from their devotion and commitment to work and sincerity and from their experience, skills and knowledge, the successful working of the IPCL and its recognition as one among “Navratna” is certainly attributed to the hard and committed

work of the employees. When the transferor Company in its legal form decides to extinguish itself and merge into another company, that transferor company as a model employer having been benefited by the workers has a duty of fair representation of its workers' interest in any bargaining process with the transferor company. The workers of IPCL before amalgamation cannot directly ask for protection of their rights and interest from the transferee company which has still not become their employer but they have a legitimate right to expect and demand their interest and rights as employees of transferor company will be properly represented by their employer IPCL and IPCL who extracts as much advantage for the workers as possible in any bargaining process. In this task, the IPCL has totally failed and it is respectfully submitted that while considering the impact of the scheme upon the workers of IPCL, the

Company Court should also consider the failure on the part of the IPCL to act as a real spokesman of the workers (1) workers' existing rights and (2) workers' interest in the Reliance Industries Limited (Transferee Company).

13.(10) As regards the existing rights of the employees of the IPCL, Clause 8 provides four things (1) no break or interruption in service i.e. continuity of service; (2) the terms and conditions shall not be less favourable than those in the transferor company; (3) respecting all settlements, agreements etc., between the employees of the IPCL and IPCL; and (4) Pension fund, Provident Fund shall be transferred to the Reliance Industries Limited.

13.(11) It is submitted that this is a general clause seeking to protect the

interests of the workers of IPCL but the terms and conditions of employment are complex and unless they are analyzed in specific details, a general omnibus clause cannot effectively deal with various rights and interests provided for and protected by the terms and conditions of employment. Moreover, these terms and conditions are not stagnant but there is also inbuilt scope for development.

13.(12) This is reason why the employees of IPCL came to know about the proposed scheme of amalgamation (it must be noted that they were never informed nor were they given any notice nor were they invited for any discussion), they submitted representations to the IPCL regarding their position and wrote a letter dated 10.4.2007 (Annexure-V to the Company Application p. 98) to the IPCL enumerating a number of their concerns, uncertainties apprehensions if the amalgamation scheme goes

through.

13.(13) Unfortunately, the transferor Company viz., IPCL even in the early stage of the proceedings of amalgamation, did not even bother to take note of this representation dated 10.4.2007, did not even spare time to give in writing its response, not to say about calling them for discussion. The IPCL therefore seems to have taken view by providing a general phrase or a clause workers will be satisfied.

13.(14) The employees have specifically dealt with each grievance or complaint or concern and during the course of arguments before the Court, they have given a detailed analysis of each of the concerns and demand of the workers. These demands do not pertain to the future demands by the employees after amalgamation but they are the grievances to be

responded to and to be dealt with at the very stage of amalgamation, so that the workers may know what their position is from the effective date.

13.(15) It is further submitted that when the IPCL was contemplating and was taking steps for proposing and carrying out a scheme of amalgamation with the Reliance Industries Limited, the IPCL ought to have taken the workers into confidence, called them for discussion and should have tried to settle all rights arising from the existing rights so that the workers can look forward to better prospects in a new company, as it is pointed out about that the rights are not stagnating but they are growing and the workers' grievance was that by simply providing that the workers will continue to be employed on terms and conditions not less favourable will not meet the legitimate grievance of the

employees because it would mean that the workers' rights and interests would be stagnated and would be fossilised.

13.(16) It is natural that if IPCL were in real sense an independent entity, it would have perhaps dealt with the workers' grievances, settled the demands before the scheme of amalgamation but in the present case, IPCL itself is controlled by the Reliance Industries Limited, it was not interested in settling the demands of the workers before amalgamation. The embargo upon the IPCL (Transferor Company) against changing the terms and conditions of the employees without explicit consent of the Reliance Industries Limited during the period between the date of filing the application and effective date makes it impossible for IPCL to settle the demands of the workers before amalgamation and the result would be that even

the existing terms and conditions will be thrown out to the mercy of the transferee Company.

13.(17) So the grievance of the employees of IPCL regarding their existing position is best summarized as under:

13.(18) As regards the provident funds, pension funds, superannuation funds, etc. the scheme provides for protection of the funds to be utilized for the benefit of the employees of the IPCL but the scheme gives discretion to the Reliance Industries Limited (Transferee Company) to keep these funds of IPCL employees either separately or to mix up with the similar funds of the Reliance Industries Limited. This is not acceptable to the employees of the IPCL because merging of these funds of IPCL at Vadodara with the similar funds of Reliance Industries Limited at Mumbai

will create several practical problems for the IPCL employees to whom these funds belong.

13.(19) As regards the IPCL employees' position in the transferee Company on the coming into effect of the scheme, the IPCL employees have strong objection to that part of Clause 8 which reads as under:

13.(20) “It is clarified that the employees of the transferor company who become employees of the transferee Company by virtue of this scheme, shall not be entitled to the employment policies and shall not be entitled to avail of any schemes and benefits that may be applicable and available to any of the employees of the transferee company (including the benefits of or under any Employee Stock Option Schemes applicable to or

covering of or any employees of the transferee company), unless otherwise determined by the transferee Company". This provision in Clause 8 is seriously objected to by the employees of the IPCL on the following grounds:

(a) The first part of Clause 8 declares that the employees of the IPCL will automatically and directly become the employees of the Reliance Industries Limited (Transferee Company) as a result of the Scheme of amalgamation but the second part of the clause says that you will not be eligible or entitled to the benefit of employment policies or other benefits etc., available to the employees of the Reliance Industries Limited. It is submitted that this is

a contradictory provision in the same Scheme. By one hand, IPCL employees become the employees of Reliance Industries Limited and by other hand, they are prevented from the benefit of the employees of the Reliance Industries Limited.

(b) It is expected that IPCL as the employer of the IPCL employees should have considered and given serious thought to the position of its own employees in the transferee company upon amalgamation. Instead, the IPCL (Transferor Company) seeks to protect and look after the interests of the transferee company by preventing its own employees from getting the benefits of Reliance Industries Limited. What business has the IPCL which is going to die to lay

down this condition for the employees who are going to be transferred to Reliance Industries Limited?

(c) This part of the clause will block the future claims of the employees of the IPCL when they demand the benefits available to the Reliance Industries Limited employees. The question is not whether the IPCL employees can claim the benefits of Reliance Industries Limited employees in future and will get the same or not is a different question but at the very stage of amalgamation, the workers of IPCL cannot be blocked and prevented from claiming such benefits by a provision in the scheme itself which will be binding upon all persons. It means that in future also when

erstwhile employees of IPCL would claim such benefits from Reliance Industries Limited, this clause will be used to prevent the workers from claiming such benefits because this prohibitory clause will be binding upon the employees of IPCL. The right of the IPCL employees to raise demands for equality before Reliance Industries Limited is sought to be taken away permanently at the very outset. This is obnoxious and cannot be permitted.

(d) On the one hand, it is argued that it is not the function of the scheme of amalgamation at the stage of sanction to provide for your future rights in the transferee Company but at the same time this

very scheme of amalgamation in its inception, prevents us from demanding benefits of Reliance Industries Limited employees. If the scheme can provide for such a prohibitory clause, it can very well provide for the permissive clauses and enabling clauses for the IPCL employees to claim such status. It is, therefore, not true to say that considering the rights and interests of the transferor Company as regards the transferee Company after amalgamation cannot be a part of the scheme and would not fall within the company jurisdiction under Sections 391-394 of the Companies Act.

(e) This part of the clause is also unjust and unfair because the transferee Company will enjoy all

the benefits of the experience, talent, skills and training of the IPCL employees after amalgamation but Reliance Industries Limited would not guarantee any rights or interests to the IPCL employees.

(f) It is the legitimate concern of the IPCL employees which must be taken into consideration viz. how shall the IPCL employees be treated in Reliance Industries Limited after amalgamation? The IPCL employees cannot be segregated as a distinct species to be preserved till extinction. The demand of the IPCL employees is that after the amalgamation, they cannot be treated as second class employees.

(g) Moreover, it is forgotten

that after amalgamation, the IPCL employees are concerned in two different two things: (1) the immediate impact of amalgamation, and (2) their future demands. It may be that the demands which might be made by the employees in future, may be taken care of by approaching appropriate forum, such as demand in rise of wages or better conditions of service but the questions regarding immediate impact are not of this character, such as the benefit of the IPCL employees in the Reliance Industries Limited set up, the question of their seniority, the question of their promotions, the status of the unions and their recognition etc. As they are immediate impact of amalgamation, it has been found that in a large

number of statutory organizations or amalgamation, the statute or the subordinate legislation specifically deal with the adjustment of the rights of the different companies or entities to be organized or amalgamated e.g. the nationalization of Life Insurance Corporation or General Insurance Companies.

Additional submission of learned counsel Mr.Girish Patel on behalf of workers of four trade Unions after Mr. K.S. Nanavati, ld. sr. counsel's reply to the above submission in rejoinder)

14. The proposed Scheme of amalgamation should not be sanctioned till the following directions are complied with:

14.(1) The issues raised by the applicants

are resolved to the satisfaction of the applicants.

14.(2) The Managements of the Transferor Company (IPCL) and the Transferee Company (Reliance Industries Limited) hold discussions/consultations/negotiations with the applicants on the issue highlighted by the applicants vide their letter dated 10.4.2007 (Annexure-III) and other issues that they raise.

14.(3) The workers of the Transferor Company (IPCL) before being automatically transferred, must be given option of retrenchment and/or retirement scheme with all the incidental payments if any of them does not want to join the Reliance Industries Limited and the IPCL and Reliance Industries Limited accept the unwillingness to join the Reliance Industries Limited as retrenchment

under the Industrial Disputes Act, 1947, with all legal payments including retrenchment, compensation or he must be offered all benefits of voluntary retirement.

14.(4) Clause 8 of the Scheme must also include the provisions with respect to grievances of the applicants contained in their letter of 10.4.2007 and other issues that the applicants may raise and as agreed upon by the parties.

14.(5) The Provident Funds, Pension Funds, etc. mentioned in clause 8(b) of the IPCL must be kept separate and should not be merged except with the consent of the applicants.

14.(6) All disputes arising from the present settlements/agreement which the Reliance Industries Limited has agreed to abide by must be resolved before the Scheme is sanctioned.

14.(7) The objectionable part of clause 8 beginning with “It is clarified” and ending with “Transferee Company” must be deleted.

14.(8) The Transferor Company (IPCL) and Transferee Company (Reliance Industries Limited) should agree that all questions arising from the immediate impact of the amalgamation such as position of workers in the Reliance Industries Limited set up, seniority, promotion, status of Union etc. should be amicably resolved in consultation with the applicants. The issues are different from the future claims which the employees of IPCL may raise.

14.(9) The IPCL workers represented by the applicants must not be denied the benefits which are given to the Reliance Industries Limited employees or which may be

given in future, simply on the ground that they were once employees of IPCL. They should not be denied the benefits of equal treatment with Reliance Industries Limited employees.

14.(10) The first part of Clause 8 regarding the “terms and conditions” should not be understood as keeping them stagnant and fixed for all time to come. The workers of IPCL should have freedom to demand better terms and conditions or to demand full integration with the employees of Reliance Industries Limited as per their choice.

14.(11) The reservation policy applied by the IPCL before disinvestment and assurance of “best efforts” given by Strategic Partner Reliance Petrochemicals and/ disinvestment will be continued after amalgamation by Reliance Industries Limited.

14.(12) The solemn responsibility undertaken by IPCL at Nagothane as regards employment guarantee to the project-affected persons must continue to be the responsibility of RIL after amalgamation.

14.13. This Court may be pleased to declare that the employees/workmen of IPCL, Transferor Company, have standing to object to the scheme before the Court.

14.14. This Court may be pleased to declare and hold that the employees/workmen of Transferor Company (IPCL) and transferee Company (Reliance Industries Limited) have a right to participate at all stages of amalgamation as the scheme is not a unilateral action of IPCL, but is a result of agreement i.e. right to be consulted and involved in the proceedings both by the Companies and before the Court.

14.15. This Court may be pleased to give directions or suggest necessary modifications in the scheme so as to make it workable and which are necessary in public interest.

Final Submissions of Mr.Girish Patel: In Sur-rejoinder:

15. Mr. Patel, ld. Advocate, has made further submissions after he received submissions from the Company and made additional submissions as under:

15.1 It is submitted that the contention of the petitioner regarding the application and effect of Sec. 25FF of the Industrial Disputes Act, 1947 in the case if IPCL employees is absolutely misconceived in law. The fear of the workers of IPCL have turned out to be true when the IPCL, the

petitioner states that under Sec.25FF if the employees of the transferor company are continued in the transferee company, they will not be entitled to any retrenchment compensation under Sec.25FF and if they refuse to join the transferee company, they will also not be entitled to benefit of retrenchment compensation. This interpretation of the petitioner company is not correct. If the interpretation sought to be made by the petitioner company viz., that once the IPCL employees become the employees of Reliance Industries Limited by virtue of the Scheme and the order of this Court, and if they refuse to join the Reliance Industries Limited, they will not be entitled to any retrenchment compensation, is correct, it clearly brings out the forcible nature of the transfer of IPCL employees from IPCL to Reliance Industries Limited. As per the interpretation of the petitioner company, the employees of

IPCL will have no option to or not to join the Reliance Industries Limited because if they refuse to work under the new employer imposed upon them, the refusal will not be treated as retrenchment and the employees will not be entitled to any retrenchment benefit after long service with IPCL. It means that the IPCL employees have to join the Reliance Industries Limited under a scheme by the IPCL in which the workers have no say and by virtue of the order of this Court.

15.2 This contention of the petitioner company shows two important points. One, if this is the effect of the scheme of amalgamation in the order of the Court, it clearly shows the absolute necessity of consultation by the IPCL with its employees before taking any decision regarding amalgamation so that all the consequences of the amalgamation can be discussed and adequate

provisions can be made in the scheme for the protection of the interest of the IPCL workers. The employees could have insisted that the workers must be free to join or not to join the Reliance Industries Limited and if they do not want to join the new company i.e. Transferee company, they would be given the benefits of retrenchment or they will be given the benefit of voluntary retirement scheme. This could not happen because the workers of IPCL were completely excluded from any consultation or dialogue or discussion with the IPCL before amalgamation. Another issue comes out is that if the interpretation put by the petitioner Company upon Sec. 25FF is correct, the result would be that the workers of the transferor company will be forced to join the transferee company even if the same terms and conditions of employment remain and if they refuse to join, they will be deprived of the benefits of retrenchment.

In other words, the workers have to accept the scheme on the point of bayonet viz., the loss of retrenchment compensation. In these circumstances, the employees of IPCL will have no option but to join the Reliance Industries Limited. This forcible transfer of employees from one company to another will be basically inconsistent with the freedom of the workers to work or not to work under a new master, as is laid down by the Hon'ble Supreme Court and the High Court in the cases mentioned above. This interpretation will make Sec. 25FF Industrial Disputes Act, 1947 vulnerable to the constitutional challenge on the ground of violation of Articles 14, 19(1)(g) and 21 of the Constitution of India.

15.3 It is further submitted that reference made by the petitioner company to the judgment of Hon'ble Supreme Court in the case of **Management, Mettur Beardsell Ltd., vs. Workmen**

of Mettur Beardsell Limited and another reported in AIR 2006 SC 2056, para 10 has no relevance to the main contention of the applicant Union because the employees have never intended that for transfer of undertaking or management under Sec.25FF, consent of the employees is necessary. The contention of the applicant Union is that the present case is concerned with the scheme of amalgamation under Secs. 391 to 394 of the Companies Act, and as the scheme of amalgamation provides for transfer of employees of IPCL to the Reliance Industries Limited and the Company has prayed for such an order from the Court, the employees of IPCL ought to have been taken into confidence by the IPCL when the amalgamation proceedings were going on because unless and until this is done, the interest of the IPCL employees cannot be properly protected. Moreover, this is also absolutely necessary before the

Company has sought for an order of the Court for sanctioning the scheme and it has been laid down by the Hon'ble Supreme Court judgments that the Court is concerned also with the public policy and public interest before granting sanction. It is submitted that even though consent of the workers to the transfer may not be a prerequisite for validity of the scheme, that does not mean that the workers cannot have any choice and the workers are not entitled to any participation in the consultation process.

15.4 It is further submitted that requirement of the consent of the workers for a scheme of amalgamation is one thing, while the requirement of consultation with the workers before the scheme is finalized is another thing. The later requirement flows from the duty of the transferor IPCL Company to duly consider and protect the interest of

its own employees when they are transferred to a new Company and also from the duty of the Court to consider whether the scheme is in the public interest or is opposed to public policy.

15.5 It is further submitted that for this requirement of consultation, what is required to be considered is whether the Companies Act explicitly prohibits the consultation with the workers. If there is no such explicit prohibition of such requirement, the provisions of the Companies Act are open to meaningful interpretation when the scheme is before the Court so that the Court can consider the workers' interest and workers' consultation in order to ensure the smooth working of the scheme.

15.6 It is further submitted that para 7 of the reply does not reply the main contention

of the IPCL employees regarding immediate impact of the scheme of amalgamation on the existing rights of the workers. This question is completely distinct from the question of future demand of the workers after the amalgamation. The question of immediate impact of amalgamation on the workers' position is a question to be thrashed out at the very stage of amalgamation and the duty lies upon the transferor Company by negotiating the scheme with the transferee company as a guardian of the interest of the workers and the guardian of public interest and public policy. On the other hand, the question regarding the future demands of employees of IPCL after amalgamation is a different question and that can be dealt with by the employees after amalgamation by resorting to appropriate forum.

15.7 It is further submitted that the

objection of Clause 8 of the Scheme in fact takes away the rights of the workers to raise demands after the amalgamation. On the one hand, the scheme automatically makes the workers of IPCL as the workers of Reliance Industries Limited and also requests the Court to make such an order only on the basis of the scheme, on the other hand the scheme itself provides that the employees of IPCL will not be eligible for any benefits available to the employees of Reliance Industries Limited by virtue of amalgamation. This is a clear contradiction.

PUBLIC POLICY AND PUBLIC INTEREST: (By Mr. Girish Patel, ld. sr. counsel)

16.(1) One of the most important questions for the Company Court is the question of public policy and public interest. Public policy and public interest are legal

standards and not like fixed specific rules. They are, therefore, flexible and dynamic and they cannot be put in a strait-jacket formula to be applied economically. The standards of public policy and public interest may vary depending upon the times and circumstance and the prevailing ideology. Under this formula, the Company Court has dynamic role to play keeping in mind the facts, circumstances and times and place and ideology.

16.(2) There is no specific provision or section in the Companies Act which explicitly and expressly or by necessary implication excludes workers/employees from amalgamation proceedings even at the stage of working out the amalgamation scheme.

16.(3) The various factors which the Court has to consider while sanctioning the scheme have not been exhaustively laid down by the

Court but they are illustrative and no general formula is laid down. Therefore, each case ultimately depends upon the facts and circumstances and therefore any one judgement dealing with a specific problem cannot be considered to be concluding the question for all time to come. The approach of the Court is to evolve the law and the legal standards gradually.

16.(4) The relevant judgements are:

(i) AIR 1997 SC 506 – Miheer Mafatlal (paras 28 onwards and principles laid down – pages 519-529

(ii) (1995) 83 Company Cases 30 – Hindustan Lever Case – page 37 relating to fairness, page 39 (public interest) page 40 (prudent business management test)

(iii) BANK OF BARODA LTD. VS.

MAHINDRA UGINE STEEL CO. LTD. (1976) 46 Company Cases 227 – page 232 (3 tests to be considered, pages 240-245 (prudent man of business test) page 246 – workers' interest as part of public interest.

(iv) (1996) 47 Company Cases page 279 – relevant pages: 287 to 290 and 293

(v) In re HATHISING MANUFACTURING COMPANY (IN LIQUIDATION) (1976) 46 Company Cases – pages 59 – Relevant pages are: page 66 (refer to workers' meeting by direction of the Court to consider the scheme) – page 68 (3 tests), page 79 (prudent business management test) and which is a prudent Manager page 82 – Court's continuous supervision, directing the appointment of a representative of

Textile Association as one Director to supervise the scheme.

<u>MONOPOLY:</u> (Submission of ld. Advocate Shri Shalin Mehta)

17.(1) Creation of monopoly of amalgamation results in creation of monopoly status with Reliance Industries Limited or in concentration with economic power in the hands of a few individuals. Monopoly status or concentration with economic power in the hands of a few is opposed to Article 39(b) and (c) of the Constitution of India. Article 39 provides that the State shall, in particular, direct its policy towards securing – clause (a) xxxx, clause (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; clause (c) that the operation of the economic system does not

result in the concentration of weal and means of production to the common detriment. The Directive Principles of State Policy, though not enforceable in Courts of law, are in the governance of the Country and as held by the Hon'ble Supreme Court of India in several cases, a proper balance is required to be struck between the fundamental rights and the Directive Principles of State Policy while construing a statute or any action. Therefore, in the present case, the relevant provisions of the Companies Act, 1956 (Sections 391 and 394) are required to be read and interpreted in conjunction with Article 39 of the Constitution of India.

17.(2) A scheme of amalgamation cannot be de hors public interest and public policy. Acquisition of monopoly status or a controlling market share in the industry is a very important element of public interest and

public policy The Company Court exercising equitable jurisdiction in amalgamation proceedings, is the guardian or custodian of public interest and public policy. Therefore, the aspect of public interest and public policy is required to be gone into by the Company Court in amalgamation proceedings when a scheme of amalgamation comes up for sanction. Obviously, public interest scrutiny cannot be left to the petitioner Company or to the rent seekers of capital.

17.(3) **Hindustan Lever Employees' Case (1995 Suppl. (1) SCC 499)** deals with the public interest element involved in a scheme of amalgamation or merger. Thus, as stated by the Hon'ble Supreme Court, creation of monopoly status and the resultant entity – competitive behaviour may be a ground to reject a proposed scheme of amalgamation.

17.(4) This public interest and public policy element has not been gone into at all by the Union of India or the Registrar of Companies or the Official Liquidator. Neither the report of the Official Liquidator nor the report of the Registrar of Companies reflects that the acquisition of monopoly status or merger or amalgamation was a serious concern to be addressed.

17.(5) The Department of Justice guidelines applicable to mergers and acquisitions taking place within the jurisdiction of the United States of America show the concern of the Government to merger resulting in acquisition of monopoly status or anti-competitive behaviour. The Federal Trade Commission (an agency established to examine in anti-competitive behaviour of firms) and most jurisdictions in the United Stats apply what is known as a “per se” rule to mergers and

acquisitions resulting in monopoly status. If a merger or acquisition is found to result in creation of market power or market share exceeding 50%, the merger or acquisition is not allowed. The Department of Justice guidelines only reflect the concern with which big mergers are viewed. These concerns cannot be said to be alien to amalgamations and mergers taking place in India where some of them would result in creation of a monopoly or in anti-competitive behaviour.

HIDDEN OBJECT:

18.(1) There is a hidden object between the proposed scheme of amalgamation. This hidden object is so hideous that the proposed scheme of amalgamation is required to be trashed.

18.(2) As held by the Hon'ble Supreme Court in Miheer Mafatlal's case, “for ascertaining the real purpose underlying the scheme with a view to satisfy on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

18.(3) The real and apparent purpose of the present scheme of amalgamation is that Reliance Industries Limited wants to strip IPCL of its assets for diverting funds to the Special Economic Zones to steal the Crown Jewels of IPCL for its own risky business ventures. Reliance Industries Limited wants to wipe out the reserves of IPCL worth Rs.4500 crores in one stroke. Reliance Industries Limited wants to undertake a systematic liquidation of IPCL assets to fund its ventures. The Company Court ought not to approve of a scheme that has its object a

systematic liquidation of the transferor company's assets. In this context, the observations made by Hon'ble Supreme Court in para 28 of Miheer Mafatlal's case are apposite.

18.(4) In the past, IPCL was considering to be a “Navratna”. IPCL was classified as a “strategic sector” industry. The “strategic sector” was considered to be so important to India that private ventures were not allowed entry. Under the proposed scheme of amalgamation, Reliance Industries Limited will come to acquire a “strategic sector” industry without any reciprocating social responsibility. Can it be of any public interest to rip off a company and dismantle it without having regard to the various economic and social factors concerning the society. In this context, the Hindustan Lever Employees' decision of Hon'ble Supreme Court makes an

observation that “it is not the interest of the shareholders or the employees only but the interest of the society which may have to be examined. And a scheme valid and good may yet be bad if it is against public interest.”

18.(5) The burden to prove that the proposed scheme of amalgamation is in the public interest or is not opposed to public interest and public policy lies on the petitioner Company who comes before the Company Court for sanction. Thus burden cannot be shifted upon the objectors by called upon them to show that the proposed scheme of amalgamation is not in public interest. One of the elemental principles of the law of evidence is that the burden to prove a fact would lie on the party ascertaining it. Under Sections 391 to 392 of the Companies Act, the petitioner Company can get sanction of a Scheme of amalgamation from the Company Court

only if the scheme is not against public interest and public policy. This means that a heavy burden lies on the petitioner Company to prove affirmatively that the scheme proposed is not opposed to public interest and public policy. There is complete lack of pleadings on this aspect by the petitioner Company. The pleadings of the Company Petition do not show how the proposed scheme of amalgamation is not opposed to public interest and public policy or that the scheme is in public interest. By merely stating in the pleadings that the proposed scheme is not opposed to public interest and public policy cannot satisfy the stringent test of public interest and public policy in amalgamation proceedings. The petitioner Company would have to show to the Court that several economic and social factors affecting society have been taken into account while proposing the scheme of amalgamation. This is totally absent in the present case.

PIERCE THE VEIL:

19. Reasons why the Company Court in the present case, pierce the veil of apparent corporate purpose and judiciously X-ray the present proposed scheme of amalgamation.

19.(1) At no stage of the proposed scheme of amalgamation, the workers and employees of IPCL or the registered trade unions of IPCL have been consulted.

19.(2) Even the most basic document asked for by the objectors was denied by the petitioner Company. The share valuation report which forms the basis of the scheme was denied to the objectors thought they specifically asked for a copy of the same. Thus, there has been a complete lack of transparency and openness in the proceedings

leading up to the present Company Petition.

19.(3) IPCL is an associate Company of Reliance Industries Limited since the year 2002. Reliance Industries Limited holds controlling shares in IPCL. The share holding pattern of IPCL is such that Reliance Industries Limited can write rough shod over the dissenting voice in IPCL. This ought to create enough suspicion in the minds of the Court so as to heighten the level of scrutiny while examining the proposed scheme of amalgamation.

19.(4) The share exchange ratio worked out by the experts suffers from gross and material irregularities. The valuation report submitted to the Company Court does not disclose or divulge any facts and figures in support of the conclusion arrive at by the experts that a fair share exchange ratio would

be one fully paid up equity share of Reliance Industries Limited in exchange of five fully paid up equity share of IPCL.

19.(5) The amalgamation or merger would result in creation of monopoly power with Reliance Industries Limited. Acquisition of monopoly power and the resultant anti-competitive behaviour are opposed to public interest and public policy.

19.(6) The proposed scheme of amalgamation completely ignores the interest of the society at large. The proposed scheme does not guarantee creation of more jobs or more competition or availability of products to the consumers at cheaper prices.

19.(7) The conduct of the petitioner Company bars it from claiming any relief in

the Company Petition. Before the equity shareholders' meeting on 14.4.2007, certain minority equity shareholders were threatened to sign blank proxy forms in the petitioner Company. This antecedent conduct of the petitioner Company is a relevant factor to be taken into account by the Company Court at the time of sanction.

19.(8) The proposed scheme contains self-contradictory clauses. One of the prayers in the Company Petition is that an order be passed under Section 394 of the Companies Act, 1956, that all permanent employees of the petitioner Company as on the effective date shall become the employees of the transferee Company (Reliance Industries Limited) in accordance with the provisions set out in the scheme. Diametrically opposed to this, Clause 8.1 of the scheme of amalgamation provides that “it is clarified that the employees of

the transferor Company (IPCL) who become employees of the transferee Company (Reliance Industries Limited) by virtue of this scheme, shall not be entitled to the employment policies and shall not be entitled to avail of any schemes and benefits that may be applicable and available to any of the employees of the transferee Company (including the benefits of or under Employee Stock Option Scheme applicable to or covering all or any of the employees of the transferee Company) unless otherwise determined by the transferee Company." Thus on the one hand the petitioner Company seeks an order that the employees of IPCL would become the employees of Reliance Industries Limited with effect from 1.4.2006. But on the other hand, the scheme says that the employees of IPCL would not really become the employees of Reliance Industries Limited. This makes the scheme obnoxious, wholly unfair, ex facie unreasonable and patently

unjust. The scheme would block the future of the employees of IPCL for an indefinite period.

SHARE EXCHANGE RATIO/SWAP RATIO OF 1:5:

20. Share exchange ratio/swap ratio of 1:5 (one share of Reliance Industries Limited in exchange of 5 shares of IPCL) is unfair, unjust and prejudicial to the whole class of equity shareholders of IPCL.

20.(1) The following are the infirmities and irregularities with regard to the share exchange ratio.

20.(2) Those specifically asked for and demanded at the meeting of the equity shareholders of IPCL held on 14.4.2007, the share valuation report prepared by M/s. Pricewaterhouse Coopers Pvt. Ltd. And Ernst &

Young Pvt. Ltd., to arrive at the share exchange ratio was not supplied to the applicants of the Company Application No. 259 of 2007. Thus, the objectors have been denied a fair opportunity to comment on the report.

20.(3) As the share valuation report was kept open for inspection on the day of the meeting of equity shareholders of IPCL, a mere inspection of the report would not have amounted to a fair opportunity to comment on the report. The Hon'ble Supreme Court held that share valuation is a technical and complex matter. Laymen like the minority shareholders of IPCL cannot be expected to comment on the spur of the moment on a matter of such expertise and technicality. The petitioner Company would not have suffered any prejudice if one copy of the share valuation report was supplied to the objectors. However, the objectors have

suffered a severe prejudice by not being able to comment or even peruse the share valuation report.

20.(4) While determining the fairness, justness and wisdom of the share exchange ratio, the Company Court has to see whether the proper accounting principles are followed, the proper methodology is adopted and relevant factors are taken into account and irrelevant factors are eschewed. This would not mean that the Company Court is not to undertake any inquiry after finding that the share exchange ratio is recommended by experts. In fact, in the case of HINDUSTAN LEVER EMPLOYEES' case reported in 1995 Suppl. (1) SCC 499, the Hon'ble Supreme Court has referred to various factors that may have to be taken into account in determining the final share exchange ratio.

20.(5) The learned advocate has submitted

that this view is again reiterated in MIHEER MAFATLAL'S CASE (1997) 1 SCC 579 at page 620. Thus, the Court's supervisory role in amalgamation proceedings will not prevent it from making an inquiry as to whether all relevant factors were taken into account by the experts while arriving the share exchange ratio.

20.(6) Several important factors highlighted by the applicants in Company Application No. 259 of 2007 have not been taken into account by the experts while arriving at the share exchange ratio. Some of these factors are:

20.(7) Fresh valuation of IPCL's assets has not been undertaken since disinvestment in the year 2002. On the other hand the assets of Reliance Industries Limited have been valued on as many as four

occasions before the proposal of the present scheme of amalgamation. Thus IPCL has been severely undervalued.

20.(8) The cash reserve ratio of IPCL is more available than the cash reserve ratio of Reliance Industries Limited.

20.(9) The price earning ratio of Reliance Industries Limited is 19 whereas the price earning ratio of IPCL is 6. Thus IPCL is 3 times stronger than Reliance Industries Limited. IPCL has that much more earning capacity.

20.(10) IPCL is an associate company of Reliance Industries Limited since the year 2002. The share holding pattern of IPCL would show that Reliance Industries Limited holds controlling shares in IPCL. On

account of this, a heavy burden lies on the petitioner Company to show that there had been arms-length dealing with IPCL and Reliance Industries Limited before adopting the share exchange ratio.

20.(11) A look at the share valuation report also shows that no facts and figures concerning the two companies (Reliance Industries Limited and IPCL) are referred to. Without making any reference to the facts and figures concerning the two companies, the experts have recommended a share exchange ratio of one fully paid up equity share of Reliance Industries Limited of Rs. 10/- face value for five fully paid up equity shares of IPCL of Rs. 10/- face value without mentioning any

facts and figures. It is not unknown that valuation involves statistics, mathematics, and economic models. There is no mathematics or statistics or econometrics preferred in the share valuation report. The conclusion of the experts can be separated only by relying upon facts and figures of the two companies. As the facts and figures of the two companies are totally absent in the share valuation report, it is not even possible for the objectors to comment on the report. The share valuation report must at least show that the relevant factors of the two companies are taken into account for determining the share exchange ratio. Otherwise, the share valuation report becomes a mere ipse dixit of the experts.

20.(12) It is submitted that page 5 of the share valuation report states that the market value of IPCL has been computed by averaging the value and volume of shares traded for the last three months. Similarly the report also mentions that market value of Reliance Industries Limited has been computed by averaging the value and volume traded for the last three months. Clearly, this period of three months is too short to decide fairly the market value of the respective companies. In MIHEER MAFATLAL'S case (supra), the Chartered Accountants M/s. C.C. Choksi & Company had taken into account the market price of equity shares of past 24 months (page 619 para 40). In the present case, the

petitioner is seeking sanction for the proposed scheme of amalgamation with effect from 1.4.2006. When the petitioner Company is seeking sanction with effect from 1.4.2006, common sense requires that the market value of the respective Companies ought to be computed by averaging the value and the volume of shares traded for the last 12 months before 1.4.2006. Instead, in the present case, the period from December 2006 to February, 2007 has been taken into account by the experts to work out the market value of the respective Companies. This is patently unfair, ex facie arbitrary and manifestly illegal. Real market value of the respective Companies could not have been arrived at by merely averaging the value and the

volume of shares traded for the period from December 2006 to February, 2007, because by then the whole market had known about the proposed scheme of amalgamation between the two Companies. Obviously, speculative element could not have been avoided in ascertaining the market value of the respective Companies because as soon as news of the proposed scheme of amalgamation entered the market, the trading in the shares of the respective Companies would have increased. To arrive at the real market value of the respective Companies, the period of 12 months prior to 1.4.2006 ought to have been taken into account by the experts. As this has not been done in the present case, it can be easily

assumed that the share exchange ratio suffers from speculation.

20.(13) In the absence of detailed valuation report, there is a presumption against the petitioner Company of bad faith and ulterior motive. Burden to prove that the Scheme is fair, reasonable and not against public policy / interest is on the petitioner Company, in the absence of which the Company Court can strike down the Scheme under its supervisory jurisdiction.

20.(14) In support of the above objections, the objectors have relied upon :

(i) In Re. Torrent Power AEC Ltd. (2007) 38 Comp. Cases 139 (at pages 160-161)

(ii) G.L. Sultania Vs. SEBI (2007) 5 SCC 133.

ADDITIONAL SUBMISSIONS MADE BY MR. SHALIN MEHTA, LD. ADVOCATE (RE: SHARE EXCHANGE RATION) – IN REJOINDER:

20.(15) The following are the additional infirmities and irregularities with regard to the share exchange ratio:

20.(16) Though it was submitted at the time of oral arguments on behalf of the petitioner Company that the share valuation report is attached with the Official Liquidator's report in the present proceedings, the said report is not the share valuation report at all. The letter dated 9.3.2007 that is annexed with the Official Liquidator's report cannot be called a share valuation report.

It is at the most a letter/certificate issued by the experts conveying that they have recommended a share exchange ratio of one fully paid equity share of Reliance Industries Limited in exchange of five fully paid up equity shares of IPCL. What was kept open for inspection by the petitioner Company at the meeting of the equity shareholders held on 14.4.2007 was not the share valuation report but this letter/certificate dated 9.3.2007 issued by the experts.

20.(17) By not disclosing the share valuation report at the meeting of the equity shareholders of IPCL held on 14.4.2007, though a demand was raised by the objectors, the

petitioner Company has not made a true, full and fair disclosure as required under the proviso to Section 391(2) of the Companies Act, 1956. In any scheme of amalgamation, the share exchange ratio is the most basic and fundamental document. Share exchange ratio can be arrived at only from the share valuation report. Therefore, when a specific objection is raised to the share exchange ratio, it is imperative on the part of the petitioner Company to disclose the valuation of the shares by producing the share valuation report at the meeting of the equity shareholders that is convened and proposed to consider the scheme of amalgamation. Even MIHEER

MAFATLAL's case (supra) holds that any scheme of amalgamation is bound to fail unless a true, proper and fair disclosure is made as contemplated under proviso to Section 391(2) of the Companies Act, 1956. In the present case, as the share valuation report was not kept open for inspection by the petitioner Company, was not disclosed at the meeting of the equity shareholders of the petitioner Company held on 14.4.2007, and was not supplied to the objectors though a specific demand in this regard was raised by them at the equity shareholders' meeting by objecting to the share exchange ratio, the present scheme of amalgamation is violative of the proviso to

Section 391(2) of the Companies Act, 1956.

20.(18) The document dated 9.3.2007 that is attached with the Official Liquidator's report in the present proceedings is not the share valuation report on account of the following:

(a) No figures/date in support of the valuation arrived at are mentioned from the document.

(b) The document reveals that the three accounting methods stated to have been used by the experts have given out three different valuations. However, the analysis under each accounting method is not stated in the document.

(c) The document does not mention the factors that the experts have taken into account while arriving at the share exchange ratio. The factors that would normally go into determination of the share exchange ratio are enumerated in HINDUSTAN LEVER EMPLOYEES's case reported in (1995) Suppl. (1) SCC 499.

(d) The document reveals that the experts have used all the three accounting methods for the purpose of valuation of shares. However, the experts have recommended that higher weightage is required to be given to the value determined under the

“income” approach and “market” approach compared to the value determined under the `underlying assets' approach. But the document does not reveal how much higher weightage was given to the first two methods compared to the third method.

20.(19) The jurisdiction of the Company Court with regard to the share exchange ratio is supervisory. Under this supervisory jurisdiction, the Company Court can do the following.

(a) The Court can see whether the experts have taken into account the relevant factors.

(b) The Court can see that the experts have applied the correct accounting principles.

(c) The Court can see that no one factor is given undue emphasize or preference at the expense of other factors.

(d) The Court can see that the decision of the experts is not irrational or ex facie unreasonable.

(e) The Court can see that proper procedure is followed by the experts while arriving at the share exchange ratio.

(f) The Court can see whether the valuation of the shares done by the experts broadly reflects the worth of the Company.

20.(20) This can be achieved only when the share valuation report is placed on record of the amalgamation proceedings for the Company Court's perusal. There is not a single

decision either of the Hon'ble Supreme Court or of any High Court that share valuation report in an amalgamation proceeding need not be given to the Company Court or to the objectors who have raised a challenge to the share exchange ratio.

WHOSE BURDEN:

20.(21) The burden to prove that the Scheme of amalgamation is fair, just, reasonable, not unconscionable, not against public interest, not against public policy and not illegal is on the petitioner Company. The scheme is proposed by the petitioner Company. Therefore, it cannot be the burden of the objectors to show otherwise.

20.(22) Very recent amalgamation of 6 sick units, viz. Apollo Fibers Limited, Central India Polyesters Limited, India Polyfibers

Limited, Orissa Polyfibers Limited, Recron Synthetics Limited and Silvassa Industries Private Limited into IPCL in the year 2006 has resulted in a reduction of IPCL's profit at least on paper. This aspect ought to have been factored in by the experts while determining the share exchange ratio.

PROXIES:

21. Serious irregularities were committed by the petitioner Company in obtaining proxies from certain minority equity shareholders of IPCL. Certain minorities equity shareholders of IPCL were threatened or coerced into signing blank proxy forms by the Heads of Departments of IPCL before the day of the equity shareholders' meeting. First, the registered trade Unions of IPCL complained about this to the Chairman of IPCL by writing a letter on 10.4.2007. Second, the said

complaint was lodged with the Chairman of the equity shareholders' meeting on 14.4.2007. On 17.4.2007, a complaint regarding this was also made to the Chairman to Securities Exchange Board of India.

21.(1) The Chairman's report only mentions that all persons who had given proxy earlier would be allowed to vote if they remained present at the meeting and their proxy given earlier would be treated as cancelled. However, the Chairman's report does not deal with the aspect of the petitioner Company threatening and coercing certain equity shareholders to sign blank proxy forms. Clearly, the petitioner Company was guilty of irresponsible behaviour. The petitioner Company was guilty of overreaching the process of law. Such bad faith-action taken by the petitioner Company against certain equity shareholders of IPCL would be:

21.(2) Violative of Section 166 which provides for holding of Annual General Meeting under the Companies Act, 1956

21.(3) Violative of the Articles of Association of IPCL where the manner and method of giving proxy is laid down.

21.(4) Violative of the High Court's order dated 23.4.2007 passed in Company Petition No. 93 of 2007 in Company Application No. 126 of 2007. In this order, the Court had ordered that voting by proxy is permitted provided that the proxy in the prescribed form and duly signed by the person entitled to attend and vote at the aforesaid meeting, or by his authorized representative. Obviously, therefore if the proxy is obtained in an illegal manner, the same would fall foul of the High Court's order dated 23.4.2007.

SUBMISSIONS: (Re: Joint Meeting of Secured Creditors with Debenture holders)

22. Meeting between debenture holders and secured creditors to be held separately and they are to be treated as debenture holders are separate class by itself:

22.(1) The debenture holders of IPCL formed a class distinct and separate from the secured creditors of IPCL. So the debenture holders could not have been clubbed with the secured creditors. A separate meeting of the debenture holders was required to be called by the petitioner Company.

22.(2) Following are the reasons why the debenture holders of IPCL are required to be treated as a class by themselves and separate and distinct from the secured creditors of

IPCL.

22.(3) Commercial law and Common law recognize three broad categories / classes of creditors, viz. Preferential creditors, secured creditors and unsecured creditors. [Palmers Company Law, 21st Edition, page 700: (1970) 40 Company Cases 819 (at page 877) Gujarat; in re Maneckchowk and Ahmedabad Manufacturing Company Limited.

22.(4) The debenture holders of IPCL belong to the category / class of preferential creditors. In the event of liquidation of the petitioner Company, the debenture holders would get paid off first in preference to the secured and unsecured creditors of IPCL.

22.(5) The Companies Act, 1956, has special provisions for protecting the interest of debenture holders. In this connection the learned advocate has referred to Section 117A which provides Debenture Trust, Section 117B provides appointment of Debenture Trustee and duties of Debenture Trustees. Section 117C of the Companies Act provides liability of Company to create security and debenture redemption reason. These Sections have been added subsequently vide the Companies (Amendment) Act, 2000, with effect from 13.12.2000. Thus the intention of the Companies Act is to provide special protection to the class of debenture holders. The Companies Act recognizes the special and unique

status enjoyed by the debenture holders. These special provisions are not to apply to the secured and unsecured creditors of the Company. Thus, the Companies Act itself discriminates between the debenture holders and the secured creditors.

22.(6) The Articles of Association of IPCL also provides separately for debentures and debenture holder (pages 45 to 47of the Articles of Association of IPCL). There is no reference in these provisions to the secured creditors of IPCL. Thus, the Articles of Association of IPCL also confers a distinct status on the debenture holders.

22.(7) The balance-sheet of IPCL as on 31.3.2006 also provides separate

treatment to debentures and debenture holders. The debentures are not clubbed with other secured term loans and working capital loans.

22.(8) The debenture holders of IPCL and the secured creditors of IPCL have dissimilar charges over the Company's assets. Whereas the non-convertible debentures are secured by way of first equitable mortgage on all those pieces and parcel of land admeasuring 2.04 acres situated at village Angadh, Dist. Vadodara in the State of Gujarat together with all structures thereon and on all plant, machinery and equipments both present and future attached thereto, located at the Vadodara Complex of the Company and the balance

debentures by the mortgagees and charges over the properties acquired by the Company pursuant to the scheme, the term loans are secured on land admeasuring one acre situated at village Angadh, Dist. Vadodara in the State of Gujarat together with all the structures thereon and all plant, machinery and equipments both present and future attached thereto, and the whole of the other fixed assets of Vadodara and Gandhar complexes of the Company except all the pieces and parcels of land of the said complexes and working capital loans from Banks by hypothecation of stocks of raw material, stock–in-process, finished goods, stores, receivables and goods in transit of Vadodara, Gandhar, Nagothane, Allahabad and

Silvassa units. Thus, the rights and interest and charges of debenture holders are dissimilar to the rights, interest and charges of the secured creditors. On account of such dissimilarity, the debenture holders cannot be clubbed with the secured creditors.

22.(9) The Chairman's report at page 115 of the Company petition on the meeting of the secured creditors held on 14.4.2007 does not at all reflect the voting pattern between the debenture holders of IPCL and the secured creditors of IPCL. Out of 51 secured creditors (including debenture holders) alleged to have remained present at the meeting, the Chairman's report does not spell out how many of them were debenture

holders and how many of them were secured creditors. In response to this specific objection on this aspect taken by the applicants of the Company Application No. 259 of 2007, the petitioner Company has not stated in its pleadings as to how many debenture holders were present at the meeting of the secured creditors held on 14.4.2007. If the Chairman's report does not reflect the voting pattern between debenture holders and secured creditors who are two distinct and separate classes, the proposed scheme of amalgamation cannot be sanctioned. The learned advocate has relied on the decision in the case of Maneckchowk and Ahmedabad Manufacturing Company Limited reported in (1970) 40 Company Cases

819 particularly pages 873 to 878.

22.(10) The learned advocate for the applicants of Company Application No. 259 of 2007 in Company Petition No. 93 of 2007 has relied on the following decisions in support of the proposition that the debenture holders of IPCL form a class distinct and separate from the secured creditors of IPCL:

22.(11) 1995 Suppl. (1) SCC 499 at pages 514-528 – Hindustan Lever Employees' Union Vs. Hindustan Lever Limited and others.

22.(12) (1970) 40 Company Cases 819 at page 877 (Gujarat) in re. Maneckchowk and Ahmedabad Manufacturing Company Limited.

22.(13) (1994) 79 Company Cases 27, at pages

37 to 40 D.A. Swamy and others Vs. India Meter Limited (Madras).

PETITIONER COMPANY'S SUBMISSIONS ON EACH POINT OF OBJECTIONS RAISED BY THE OBJECTORS:

(A) RE:ANCILLARY INDUSTRIES:

23.1 The Objectors are neither shareholders nor creditors of the Petitioner Company and have, therefore, no locus in the present proceedings.

23.2 Letter of Intent (LOI) is NOT a concluded contract. In terms of LOI, IPCL was to obtain supplies from the Units subject to the Units meeting price and quality specifications as set out in the LOI.

23.3 IPCL, in terms of LOI, was to obtain 50% of the Unit's production and, therefore, the existence of the Units was not fully dependent on IPCL taking the supplies. IPCL obtained supplies from the Units for many years before it stopped placing orders from August, 2003 onwards, as the Units were not able to match the price and quality specifications. Before stoppage of orders, IPCL held discussions with the Raigad District Plastics Producers Association comprising these Units. In any event, IPCL took supplies from the Units in their `development phase for a reasonable period of time' as mentioned in the LOI.

23.4 Even if the said LOI was a contract, the disputes will be with respect to implementation of the alleged contract between the parties and obligations of IPCL, if any, would be assumed by the Transferee Company

post amalgamation. This Court, as a Company Court, is not the forum to entertain these matters and the Objectors may approach an appropriate forum, if they so wish.

23.5 One of the Objectors, viz. Schon Plastics Private Ltd. (`Schon'), had filed a petition in the Bombay High Court seeking directions against IPCL inter alia to comply with the contract. The Bombay High Court while dismissing the petition, observed that the dispute raised therein was contractual in nature and the remedy lies only in the appropriate form or by way of arbitration. Accordingly, the suit being Suit No.32 of 2006 has been filed by Schon in Alibagh Court, which is pending.

23.6 In terms of Clause 6 of the Scheme, upon amalgamation becoming effective, all the suits and legal proceedings pending by or

against IPCL would be continued by or against the Transferee Company. It is not even their case that the Transferee Company would be unable to honour their claims.

23.7 As alleged by the Units, 500 workers were employed by the Units. However, the Units have not produced any proof evidencing the so-called PAP employment. Further, this has never been prayed earlier either in the objections filed with this Court or in the civil suit. Moreover, the so-called PAP have never objected nor approached the Petitioner Company with their grievances. As a matter of fact, IPCL itself employed more than 600 PAP at its Nagothane Plant. Hence, the responsibility/liability of the workers employed by the Units themselves will always be on the Units and the same has nothing to do with the present Scheme.

23.8 Upon amalgamation become effective, in terms of Clause 6 of the Scheme, any proceedings pending by or against the Transferor Company shall be continued by or against the Transferee Company. Question therefore of the Objectors of losing the alleged territorial jurisdiction of their suit to be entertained at the District Court, Baroda, on the ground of Scheme being sanctioned does not arise.

(B) RE. SC/ST RESERVATION:

24.1 At the outset, since the representation made by the Objector pursuant to this Court's order dated May 8, 2007, to the Central Government and the said representation is pending for consideration, the Objector cannot agitate the same matter again before this Court.

24.2 Further, the final outcome of the appropriate/final appellate forum, if any, would, in any event, be binding on IPCL and post amalgamation, the Transferee Company.

24.3 Without prejudice to the above, IPCL had never agreed to incorporate any such clause of reservation of SC/ST employees in the Scheme nor, as a matter of fact, any such provision has been made in the Shareholders Agreement, as alleged by the Objector.

(C) RE: WORKERS

25.1 Clause 8.1 of the Scheme protects employees' rights in as much as it has fully safeguarded the interest of the employees of the Petitioner Company by providing that the terms and conditions of employment in the

Transferee Company will be without any break or interruption and the terms and conditions as to employment and remuneration shall not be less favourable than those on which they are engaged or employed by the Petitioner Company. Further, the Transferee Company undertakes to continue to abide by any agreement/settlement, if any, entered into by the Transferor Company with any union/employee of the Transferor Company.

25.2 The learned counsel has relied on the judgement in the case of **Hindustan Lever Employees' Union vs. Hindustan Levers Ltd., and others** (1995) 83 Comp. Case 1 (Bom) : (1994) 4 Comp. LJ 228 (Bom), where the Court has observed as under:

> “Whenever an undertaking is transferred whether statutorily or by court's order to another employer, it is the usual

formula to protect the workers of the transferred company by providing that the service will be continuous and uninterrupted and service conditions will not be prejudicially affected by reasons or transfer. Merger of two companies into one may necessitate adjustments in service conditions in certain areas, but that is a matter for industrial adjudication by appropriate forum. The interest of employees of both companies being adequately taken care of, held, there was no necessity of any change in the scheme of amalgamation".

25.3 There is no requirement of holding any separate meeting or discussion by the Petitioner Company with workmen/workmen's association.

25.4 The learned counsel for the petitioner relies on the decision in the case of Hindustan Lever Employees' Union vs. Hindustan Levers Ltd., and others, (1995) 83 Comp. Cases 30 : (1994) 2 SCL 157 : (1994) 4 Comp. LJ 228, Supp.1 SCC 499 (SC), page 38, para G and page 65 para C, “A scheme of amalgamation cannot be faulted on apprehension and speculation as to what might possibly happen in future. The present is certain and taken care of. No one can envisage what will happen in the long run. But on this hypothetical question, the scheme cannot be rejected. As of now, it has not been shown how the workers are prejudiced by the scheme”.

25.5 On one side, the Objectors are seeking job security and on other side they are alleging forceful continuance out of economic and legal compulsion. The objections are baseless. Workmen can continue with the

Transferee Company post amalgamation with their existing rights protected under the Scheme.

25.6 The rights of employees are well protected under the Scheme. Further, all service conditions in respect of workmen shall be guided by the applicable law in future.

25.7 The Petitioner Company relies upon the following authorities in support of the above submissions -

(a) Gujarat Nylons Ltd. Vs. Gujarat State Fertilizers Ltd., 1992(1) GLH 637, para 36. (C.K.Thakker, J.) (as he was then)

(b) Re: Hindustan Lever Ltd (1995) 83 Comp. Cases 39, page 64, para D onwards to page 65 para C.

(c) In Re: Narmada Chematur

Petrochemicals Ltd., (Re: Company Petition No. 147 of 2006 & other matters, Unreported judgment dated 9.1.2007, delivered by Hon'ble Mr.Justice M.R.Shah, page 23, para 27 and 28.

(d) In Re: Blue Star Ltd., (2001) 104 Comp. Cases 371, page 381, 389 and 395.

Additional submission on behalf of the Company regarding workers:

25.8 Dealing with the grievances as summarized in para 9 of the written submissions, it has been clarified in the course of submission that there is no compulsion under the Scheme on the workers to join the new employment. It has been pointed out that relief in para 28(3) of the petition is intended to ensure that there is a

continuity of service. Existing employees have an option not to join the service of the transferee Company and leave the service. Therefore, the provision that if the relief as prayed for in para 28(e) is granted, the existing workforce will forcibly have to join the service of the transferee company is misplaced. A similar provision in the Scheme has been considered by this Court in the matter of Gujarat Nylon Limited reported in 1992(1) GLH 637 (particularly para 24) and in the matter of Narmada Chematur Petrochemicals Ltd., unreported judgement dated 9.1.2007, Company Petition No. 147 of 2006 (particularly paragraph No. 27 of the unreported judgement). Similarly worded relief has been construed that there is no compulsion on the employees to join the transferee company that the provision has been made to ensure continuity of service and it is open to the workmen not to join the service of the transferee Company

[Ref: (a) 1992(1) GLH 637 in the matter of Gujarat Nylons Limited, paragraph Nos. 24, 25, 29, 30 and 36; (b) unreported judgement dated 9.1.2007 in the matter of Narmade Chematur Petrochemicals Ltd., paras 27 and 28; [c] Hindustan Lever Limited reported in 1995 (83) Company Cases page 30 para B to G, pg. 64, para D onwards to page 65 para-C]

25.9 Regarding the grievance that they were not consulted in the process of negotiations and their consent was not taken to the Scheme of Amalgamation, reference may be made to the decision of the Hon'ble Supreme Court in the case of MANAGEMENT, METTUR BEARDSELL LTD. VS. WORKMEN OF METTUR BEARDSELL LTD. & ANR. Reported AIR 2006 SC 2056.

25.10 Consent of workers of the transferor Company to the Scheme of merger therefore is not necessary.

25.11 Section 25FF of the Industrial Disputes Act provides for rights of the workers of the transferor company. Their consent to the transfer is not necessary. They have even no right to demand their absorption in the transferee company. If the new employer is not prepared to protect the existing service conditions and continuity of service, only right of the employees of the transferor company is as specified in Section 25FF(1) of the Industrial Disputes Act. Indisputably, in Clause 8 of the Scheme, a provision has been made for protection of the service conditions and continuity of service, and therefore, there is no “deemed retrenchment” of the workmen. Section 25FF of the Industrial Disputes Act, which provides for transfer of ownership or management of an undertaking does not provide that even in case where transferee employer protects the service conditions and

continuity of service and a workman still desires not to join the service of the transferee employer, such workmen should be entitled to anything more than what an employee gets on voluntary relinquishment of his service.

25.12 It is also held that Sections 391 to 394 Companies Act is a complete code. These provisions do not provide for consultation with the workers in case of merger or amalgamation. Meetings only of the members of the company and creditors have been provided. No statutory provision or legal principle have been pointed out by the union which make it a condition of a valid scheme that in the course of negotiation, the workers should have been consulted or failure on the part of the management to consult the workers before formulating the Scheme of merger would invalidate the Scheme.

25.13 It needs to be noted that no statutory provisions is cited by the Unions nor any binding precedent referred to in support of this contention that either the workers should have been consulted at the time of preparation of the Scheme or during negotiations or when a decision to merge IPCL with RIL was taken. In absence of such provision, it cannot be said that the Scheme is against law.

25.14 The Hon'ble Supreme Court has in the case of Hindustan Lever Limited vs. State of Maharashtra reported in (2004) 9 SCC 438 observed, particularly, paragraph Nos. 10 and 11.

25.15 The objections that the workers have the right to be heard at the time of the hearing of the petition need not be considered, since they have been already heard

and no objection has been taken to the locus of workmen to object to the Scheme.

25.16 So far as the rights of the workers subsequent to amalgamation is concerned, it is well settled that it always open to the workers to be employees of the transferee company, to raise such demand, to claim such benefit and raise such disputes as may be permissible under the Industrial Law.

25.17 Clause 8 of the Scheme does not foreclose this right of the workmen in any manner. What Clause 8 of the Scheme provides is that “by virtue” of the Scheme, the employees of the transferor company shall not be entitled to the employment policies or any schemes or benefits that may be applicable and available to the employees of the Transferee Company. This does not obviously take away the rights of the employees on becoming the

employees of the transferee company to raise such demands or disputes or claim benefits on whatever ground that may be permissible under the law, as the employees of the Transferee Company. Such demands if raised, would be adjudicated by the authorities under the Industrial Law subject to the contentions of the transferee company. The present scheme does not and cannot take away the statutory rights of the workmen under the Industrial Law.

25.18 Employees' right to seniority and promotion as of existing employees of the transferee company constitute to the extend that they are part of the existing conditions of service, which are protected by Clause 8 of the Scheme and post-merger would be governed by the provisions of the Industrial Disputes Act and in particular Section 9(a) of the Industrial Disputes Act. The Company also

relied upon the judgement of the S.C. In Mettur Beardsell Vs. its Workmen AIR 2006 SC 2056 (para 10) particularly.

(D) PUBLIC INTEREST AND PUBLIC POLICY:

26.(1) In terms of the Scheme, all the assets as well as liabilities of the Transferor Company would be transferred to the Transferee Company. Any particular item of assets / liabilities cannot be looked at separately. The question of IPCL reserves getting misused or wiped out is baseless and without any substance. The allegation that the Transferee Company wants to misutilize the assets of the Transferor Company is also baseless and without any substance. The whole of the undertakings of the Transferor Company would be amalgamated with the Transferee Company for the reasons set out in the Scheme as also in the Explanatory Statement of the Scheme.

26.(2) In Re. HCL Infosystems Limited, HCL Infinet Limtied and HCL Technologies Limited (2004) Comp. Case 861 (Del), the scheme of arrangement was challenged on the ground that the company is siphoning the profitable business. The objector referred to a TV interview in this regard. It was held (para 31) that, “... Since in the present case the overwhelming majority of the shareholders has approved the scheme, the same cannot override the opinion of the intervener. The allegation of the objector that there is an effort to siphoning of the profitable business of the company in which case the minority shareholders would be deprived of the benefit is also considered by me giving due weightage thereto. No basis is provided in support of the aforesaid allegation. Therefore, the aforesaid contention is also without any merit”.

26.(3) The third objection indirectly challenges the Government decision of disinvestment. Such type of frivolous objection cannot be dealt with in the amalgamation proceedings and should not be considered at all by this Court while sanctioning the Scheme.

26.(4) The Scheme complies with all the procedural formalities. All the desired disclosures have been made in the Scheme. The rationale benefits of the Scheme have been dealt with in the Scheme itself. There is no substance in the Objectors' allegation to pierce the veil. Further, the Petitioner Company has already presented the Scheme with requisite details. Making the Petitioner Company to further demonstrate that the Scheme is beneficial to the community at large is uncalled for, unwarranted and not a

requirement under law. The law, as settled by the Hon'ble Supreme Court is that the Scheme should not be opposed to public policy or against public interest. The burden is on the Objectors to show that the Scheme is opposed to public policy or public interest. They have miserably failed to do so.

26.(5) The learned counsel for the petitioner relies on the decision in the case of **Balco Employees Union (Regd.) vs. Union of India, (2002) 108 Comp. Cases 193 (SC)**, page 236 the Hon'ble Supreme Court has observed as under:

> “Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. IT is not for the

Court to consider relative merits of different economic policies and consider whether a wiser or a better one can be evolved. For testing the correctness of a policy, the appropriate forum is Parliament and not the Courts. In the matter of policy decision of economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be reluctant to impugn the judgments of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself. The existence of rights of protection under Articles 14 and 16 of the Constitution cannot possibly have the effect of vetoing the Government's right to disinvest. Nor can the employees claim a right of continuous

consultation at different stages of the disinvestment process. If the disinvestment process is gone through without contravening any law, then the normal consequences as a result of disinvestment must follow."

(E) MONOPOLY STATUS:

26.(6) There is no question of any monopoly status being created pursuant to amalgamation. The objectors have failed to show as to how by merging IPCL with RIL, monopoly status would be created for RIL.

26.(7) IPCL is already an associate company of RIL post disinvestment of IPCL's shares by the Union Government in favour of RIL. This relationship has been disclosed in the annual reports of RIL and IPCL.

26.(8) The US Guidelines of Department of Justice, as relied upon by the Objectors' Advocates are not relevant in the present amalgamation proceedings. There is no statutory requirement restricting amalgamation of associate company with the parent company under anti-trust laws in India.

26.(9) It is, therefore, submitted that there is no question of any monopoly status being created in favour of RIL, as alleged by the Objectors. The Regional Director and the Official Liquidator, being statutory authorities, after examining this Scheme and all relevant correspondence and documents called for by them from the Petitioner Company, were fully satisfied with the Scheme and certified to the Court that the Scheme was not against the public policy and that the affairs of the Petitioner Company have not been conducted in a manner prejudicial to

interest of the members or to public interest. In addition, both Bombay Stock Exchange Limited and National Stock Exchange of India Limited had also approved the Scheme under Clause 24(f) of the Listing Agreement.

26.(10) The learned counsel submits that the decision of the Gujarat High Court in Reliance Petroleum Limited vs. Union of India (2002) (O) GLHEL 210579, para 17 (Company Petition No. 75/2002 decided on 13.9.2002), “One more objection is to the effect that the Court should refuse to grant its approval to the Scheme on the ground of public interest as the amalgamation will result in creation of monopoly in relation to production and marketing of goos. Nothing has been shown under any Act, Rule or Regulation or any other law under which the Company Court cannot exercise jurisdiction to sanction a Scheme in the event of a possibility or likelihood of

monopoly resulting on the Scheme being sanctioned. The Apex Court has stated time and again that it is for the shareholders to decide what is in the best interest of the Company and if the shareholders have arrived at such a decision by applying approach of a prudent businessmen, it is not for Court to sit in judgment. Furthermore, nothing has been brought on record to show that even if a monopoly results, it would affect the public interest or the economic interest of the country adversely, which may be a factor having relevant bearing."

26.(11) The Petitioner Company relies upon the following authorities in support of the above submissions -

(a) In Re: Hindustan Lever Ltd (1995) 83 Comp. Cases 30, page 65 para F to G.

(b) In Re: Reliance Petroleum Ltd., 2002(O) GLHEL 210579 page 4, para 17.

(F) HIDDEN OBJECT AND PIERCING VEIL:

26.(12) As regards hidden aspect, both the companies have shown that balance sheet, public notice has been issued. Official liquidator has also filed report. The Regional Director has also filed report. Considering all these aspects, the hidden objects which are being contended is not right.

(G) PIERCING VEIL:

26.(13) As regards Piercing Veil, there are several decisions of the Hon'ble Supreme Court. In this behalf I refer to Ramaiah's Company Act where the learned author has discussed the point of piercing veil. If the

Company wants to evade tax and if there is any ulterior motive for amalgamation then one can lift the veil. Here there is no whisper about the same and there is no question of lifting veil. This contention is not well founded.

(H) RE. SHARE EXCHANGE RATIO

27.1 There is no statutory requirement of carrying out valuation by independent valuers to arrive at share exchange ratio preferably under Sections 391-394 of the Companies Act. It is only for the guidance and assistance of the Board of Directors of companies to propose a share exchange ratio.

27.2 Further, the Share Exchange Ratio has been calculated by the recognized valuers i.e. two eminent Chartered Accountants Firms and once the same has been decided by the valuers the Court may not go into the technicalities

of the case and adjudicate the share exchange ratio as an appellate Court.

27.3 The petitioner Company relies upon the decision in the case of **Hindustan Lever's case reported in (1995) 83 Comp. Cases 30 (SC), at page 37**, para B and C, “... the jurisdiction of the court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A Company Court does not exercise an appellate jurisdiction. It exercises a jurisdiction founded on fairness. It is not required to interfere only because the figures arrived at by the valuer was not as good as it would have been if another method had been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair for the shareholders of the company which was being merged. The Court's

obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body".

27.4 The equity shareholders of the Petitioner Company have approved the Scheme incorporating the share exchange ratio by an overwhelming majority.

27.5 The petitioner Company relied upon the decision of the Supreme Court in Miheer H. Mafatlal vs. Mafatlal Industries Ltd. (supra), para 40, referred to by the Gujarat High Court in Reliance Petroleum Ltd., Vs. Union of India (2002) (0) GLHEL, 210579, (Coram: D.A. Mehta, J) [Company Petition No. 75 of 2002 decided on 13.9.2002] where at para 23 the Court observed that "... It has also to be kept in view that which exchange ratio is better is in the realm of commercial decision of well informed equity shareholders. It is not for

the Court to sit in appeal over this value judgment of equity shareholders who are supposed to be men of world and reasonable persons who know their own benefit and interest underlying any proposed scheme. With open eyes they have okayed this ratio and the entire scheme..”

27.6 Valuation Report was kept open for inspection for all shareholders before the meeting. Notice convening the meeting of shareholders clearly stated that the report of the valuers was available for inspection at least for 21 days (page 292 of the Company Petition 93 of 2007). In spite of this, none of the Objectors availed of the opportunity to inspect the same or objected for such inspection, asking for a copy of the report.

27.7 There is no statutory requirement of circulation of valuation report to

shareholders nor is there any statutory requirement of filing a valuation report with the Court. In any case, the valuation report is part of the record of proceedings, in as much as it is annexed with the Official Liquidator's report submitted to this Court.

27.8 The allegation that the valuation report was not submitted even to the Court is also baseless and factually incorrect, in as much as the Official Liquidator has annexed the said valuation report along with his report filed in the present proceedings. In any event, the Regional Director and the Official Liquidator, being statutory authorities, had examined the valuation report and submitted their no-objection to this Court.

27.9 For arriving at the share exchange ratio, the valuers have adopted the well known

methods of (i) net assets value, (ii) earnings value method and (iii) market value method. These methods have been approved by the Hon'ble Supreme Court in the cases of Hindustan Lever Ltd and Mafatlal Industries Ltd.

27.10 The allegation that six polyester companies are amalgamated with IPCL in 2006 for reducing profitability of IPCL is both, factually and legally in correct. As a matter of fact, post amalgamation turn over and profit of IPCL have gone up. The said amalgamation is concluded and cannot be indirectly challenged in this proceeding.

FURTHER SUBMISSIONS: SHARE EXCHANGE RATIO

28.1. It is reiterated that there is no statutory requirement of carrying out

valuation exercise. It is merely a tool to assist and guide the Board of Directors to propose a share exchange ratio for consideration of the shareholders. Further, Section 391 does not require detailed workings to be shown to shareholders/court. The Sultania's case relied upon by the Objectors is not relevant in the instant case, because that case was pertaining to SEBI Takeover Regulations, which specifies principles of valuation in case the shares are infrequently traded. Such specifications are not at all relevant in the scheme of amalgamation under Section 391-394 of the Act. (p. 57)

> "It is reiterated that in Hindustan Lever Employees Union v. Hindustan Lever Ltd., and others, (1995) 83 Comp. Cases 30 (SC), at page 57, the Supreme Court has approved the view expressed by the Gujarat High Court. It was

held that “A similar question came up for consideration before a Division Bench of this Court in the case of Jitendra R. Sukhadia vs. Alembic Chemical Works Co. Ltd., (1987) 3 Comp LJ 141 : (1988) 64 Comp. Cases 206. That was also a case of amalgamation. In the case, it was held that the exchange ratio of the share of the two companies, which were being amalgamated, had to be stated alongwith the notice of the meeting. How this exchange ratio was worked out, however, was not required to be stated in the statement contemplated under Section 393(1)(a).”

VALUATION NOT AS PER MIHEER MAFATLAL CASE:

28.2 The petitioner Company submits that the contours laid down in the Miheer Mafatlal

case have not been adhered to in the instant case. Further, nowhere in the said case, the Supreme Court has observed that details of the working for arriving at the share exchange ratio have to be covered in the valuation report. Therefore the allegation of the Objectors that the valuation is not as per the Proviso to Section 391(2) of the Act and the guidelines set out in the case of Miheer Mafatlal is baseless and without any merit.

VALUATION NOT AS PER HLL/TOMCO CASE:

28.3 The contention and allegation of the Objectors that all the 8 factors specified by `Weinberg and Blank' in the book `Takeovers and Mergers' as referred to in HLL/TOMCO case have not been taken into account while arriving at the share exchange ratio in the instant case is false and baseless. In fact, the Supreme Court has not mandated adherence

to any one or more of the 8 factors dealt with by Weinberg and Blank and the said factors are merely recommendatory in nature. [Please refer page 53, paras D & E of HLL's judgment reported in (1995) 83 Comp. Case 30]. The petitioner Company submits that there is no merit in examining whether any one or more or all of these factors have actually been taken into account while arriving at the share exchange ratio in the instant case. In any event, admittedly, in the instant case, the valuers have taken into account the relevant factors and methods as set out in the valuation report to arrive at the share exchange ratio.

VALUATION NOT AS PER FEMA REGULATIONS/CGI GUIDELINES:

28.4 The Objectors' contention that

valuation is not as per the FEMA regulations / Controller of Capital Issues ("CCI") guidelines is lacking in merit. The Objectors have failed to show as to which FEMA regulations are applicable for arriving at share exchange ratio in relation of amalgamation under Sections 391-394 of the Act. Further, CCI guidelines have been repealed way back in the year 1992.

28.5 The overall allegation of the Objectors that the Valuation Report is not proper and the Scheme is not fair and reasonable : In re. Reliance Petroleum Ltd., 2002(O) GLHEL 210579, (supra) this Court (Coram: D.A. Mehta, J) dealt with identical issues and held as under in para 27:

> "27. Thus, by an overwhelming majority, those present have voted in favour of the resolution i.e. in

favour of approving the Scheme as per share exchange ratio proposed on the basis of the valuation report dated 3.3.2002. In these circumstances, it is not open to the Court to hold that there was any impropriety in the valuation of the shares. In fact, the valuation report has stated that it has based its conclusion of value on the figures of assets and liabilities of both RPL and RIL reflected in the Balance Sheet as on 31.3.2001 along with the audited financial statement for the year ended on 31.3.1999 and 31.3.2000. The valuation report has also taken into consideration extracts of unaudited financial statements for the 9 months period ended on 31.12.2001. This is over and above the discussions with the management of both RPL and RIL, other informations,

explanations and representations as were required and provided by the respective managements along with such other analysis, reviews and inquiries as were found necessary. The valuation report further states that the valuers have not made any independent investigation and assume no responsibilities for the various informations, details, explanations and representations placed before the valuers. It was vehemently urged during the course of hearing that this sort of disclaimer would virtually amount to the valuers denying any responsibility as regards the validity or genuineness of the share exchange ratio. It is necessary to note that the figure of exchange ratio arrived at by the valuers could not be shown to be vitiated by fraud and/or mala

fide. It is settled legal position that merely because the determination is done by a slightly different method which might result in a different conclusion would not justify interference unless it was found to be unfair. There is nothing on record to hold that the exchange ratio, brought on record by the aforesaid valuation report, is in any manner unjust or unfair. At the cost of repetition, it requires to be stated that it is the commercial wisdom of the parties to the Scheme who have taken an informed decision about the usefulness and propriety of the Scheme by supporting it by the requisite majority vote that has to to be kept in view by the Court. The Court has neither the expertise nor the jurisdiction to delve deep into the

commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority".

28.6 Therefore, the allegations of the Objectors, inter alia, that no due diligence was carried out in determining the share exchange ratio, the valuers assumed no responsibility for valuation and they relied on the information supplied by the management, unaudited figures were considered by the valuers etc., have all been addressed by this Court in the above case, in particular paras 18 to 28 thereof.

28.7 The Petitioner Company relies upon the following authorities in support of the above submissions -

(a) Hindustan Lever Employees Union vs. Hindustan Lever Ltd., and others, (1995)

83 Comp. Case 30(SC), at page 37, para B to H, page 54, para C&D.

(b) Reliance Petroleum Ltd., Vs. Union of India (2002) (O) GLHEL, 210579, para 18 to 28.

(c) Miheer Mafatlal vs. Mafatlal Indus tires Ltd (1997) 1 SCC 579, page 615, para 40; page 617, para (b) to (d); page 618, para (d) & (e).

(d) HCL Infosystems Ltd. (2004) 121 Comp. Case 561 (Del), para 26 to 29.

(e) In Re: Arcoy Overseas Pvt. Ltd., Manu/GJ/0716/2005, para 7 and 8.

(f) HCL Infosystem Ltd. (2004) 121 Comp. Case 561(Del).

(g) (2001) 107 Comp. Case 232, page 235 to 238.

(h) (2000) 99 Comp. Case 276.

(i) In Re: Alfa Quartz Ltd. (2001) 104 Comp. Case 71 (Guj).

(j) In Re: Gujarat Ambuja Cotspin Ltd., In Re: Gujarat Ambuja Protein Ltd., In Re: Gujarat Ambuja Exports Ltd (2001) 104 Comp. Case 397 (Guj).

(k) In Re: H.K.Dave P.Ltd., In Re: H.K.Gas Co. P.Ltd. (2001) 104 Comp Case 650 (Guj).

(I) RE: PROXIES:

29. It is a false, baseless and bald allegation that any coercive method or force

was applied for signing Proxy forms.

29.1 Not a single person has addressed any letter to the Chairman of the Court convened meetings or the Company for withdrawal of his proxy.

29.2 Even otherwise, during the meeting, the Chairman had assured that even if any of the employee shareholders had given a proxy form earlier, but if they were present at the meeting, then they would be entitled to participate in the voting and the proxy forms given earlier would be held invalid, while their votes would be considered. Chairman had also instructed scrutineers accordingly. This is also stated in the Chairman's Report submitted to this Court. Thus, there is no violation of the provisions of the Companies Act as also of the order of this Court dated 16.3.2007 in Company Application No.126 of

2007 as alleged.

29.3 Signing of blank proxy form is not an illegality as has been held by Delhi High Court in the matter of Swadeshi Polytex Ltd., reported in 1988 (63) Comp. Cases 709 (pages 716 to 718).

(J) RE. DEBENTURE HOLDER.

30.1 The debenture holders do NOT constitute a separate class. They are either secured or unsecured creditors, as the case may be. In the present case, the debenture holders of the Petitioner Company are secured creditors.

30.2 The concept of `preferential creditors' is not relevant in the context of amalgamation. Section 530 of the Companies Act lists out different categories of

preferential creditors such as Government revenues, wages of workmen, provident fund, pension fund, gratuity fund and so on. Debenture holders are NOT one among them. Like any other secured creditors, debenture holders are entitled to lay their hands on the assets secured in their favour for recovery of their dues. They are placed on the same footing as other secured creditors. The sub-classes of creditors may be relevant ONLY if different treatment is given/offered in the scheme. If the same treatment is given to all secured creditors including debenture holders in the Scheme, then there is no requirement of classifying the debenture holders as a separate class.

30.3 The petitioner Company relies on the decision of this Court in Miheer Mafatlal Industries case decided by the Division Bench of Gujarat High Court (Coram: C.K. Thakkar

(as he ws then & R. Balia, JJ)) (upheld by the Supreme Court), reported in (1996) 87 Comp. Cases 705(Guj), at page 733, para B and H, “In our opinion, a plain reading of the section does not leave any doubt that only where separate terms are offered to separate classes of shareholders or creditors under the proposed compromise or arrangement, separate meetings are required to be held in respect of each class of creditors or shareholders for whom separate compromise or arrangement has been offered. The classification of members or creditors will be founded on the basis of difference in terms offered under the Scheme. The difference in terms of the Scheme can be the only criterion for identifying the separate class for the purpose of convening a separate meeting for such class”.

30.4 Referring to various pronouncements including the above, this High Court held in

In re. Arvind Mills Ltd. (2002) 111 Comp. Cases 118 (Guj.) that, “... The classification of members or creditors can be founded on the basis of difference in the terms offered under the scheme. The difference in terms of the scheme can be the only criterion for identifying separate class for the purpose of convening a separate meeting for such class”.

30.5 The petitioner Company relies on the decision of this Court in Miheer H.Mafatlal vs. Mafatlal Industries Limited, (1996) 87 Comp. Cases 792 (SC) referred to in Re.Spartek Ceramics India Limited Manu/AP/0991/2005 (Del), at para 13 of the judgment “It is, therefore, obvious that unless a separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class, no separate class of sub-class of the main class of members or

creditors is required to be convened."

30.6 The petitioner submitted that as consistently, held by the Courts that the classification of creditors should be based on the treatment which is being offered to them under the scheme of arrangement. Merely because debenture holders have first charge does not make them a separate class distinct from other secured creditors.

30.7 Merely because the Companies Act provides for provisions like creation of security, debenture redemption reserve etc., under Sections 117A – 117C, debenture holders will not constitute as a separate class from among the secured creditors. In Re: Siel Ltd, 2004 (122) Com. Cases 536 (Del), Manu/DE/0666/2003, pages 13, 14, 16 and In Re: Spartek Ceramics Ltd, Manu/AP/0991/2005 para 13.

30.8 Disclosures in balance sheet are as per the statutory requirements of Schedule VI to the Companies Act and the applicable accounting standards. Further, mere disclosures cannot make debenture holders a separate class of stakeholders. On the contrary, in a balance sheet of a company drawn up in the form given in Schedule VI, debenture holders are classified under “Secured Creditors”.

30.9 It was held in National Rayon Corporation Ltd. vs. Commissioner of Income Tax, AIR 1997 SC 3487, page 3490, para 12, that “... debentures were nothing but the secured loans. Merely because the debentures were not redeemable during the accounting period, the liability to redeem the debentures did not cease to exist. It was redeemable or repayable at a future date. But it was a

known liability. In the form of balance sheet prescribed by the Act in Schedule VI, the secured loans have to be shown under the heading `liabilities'. Secured loans include (i) debentures, (ii) loans and advances from banks, (iii) loans and advances from subsidiaries, and (iv) other loans and advances. The secured loans might not be immediately repayable, but the liability to repay these loans was an existing liability and has to be shown in the company's balance sheet for the relevant year of accounts as a liability...”

30.10 Articles of Association of IPCL contains the standard provisions based on the provisions of the Companies Act read with Table – A. There is no specific provision treating debenture holders as a class separate from the other secured creditors.

30.11 Further, the petitioner Company submits that the Objectors' contention that the Chairman's Report ought to have specified the voting pattern of secured creditors and debenture holders separately, is again without any substance and statutory backing.

30.12 The petitioner Company relies upon the following authorities in support of this finding:

(a) National Rayon corporation Ltd. vs. CIT, AIR (1997) SC 3487, page 3490, para 12.

(b) In Re: Siel Ltd, (2004) 122 Company Case 536 (Del), Manu/DE/0666/20034, page 13, 14, 16.

(c) In Re: Spartek Ceramics Ltd, Manu/AP/0991/2005, para 13.

(d) Miheer Mafatlal vs. Mafatlal Industries Ltd (1997) 1 SCC 579, page 613, para 39, page 614, para c,e,f,h; page 615, para (a) to (e).

(e) Mafatlal Industries Re (1996) 87 Comp. Case 705 (Guj.), page 731, para G to page 736, para H.

(f) Arvind Mills Ltd (2002) 111 Comp Case 118 (Guj.), para 12 to 14.

(g) Mafatlal Industries Re (1996) 87 Comp. Case 705, page 733.

(h) In Re: Core Health Care Ltd (2007) 138 Comp. Cases 204, page 248, 253, 260, 291, 292, 296, 306, 325, 326.

(i) (2002) 112 Comp. Case 674 (Bom)

(j) Administrator of the Specified Undertakings of the UTI vs. M/s. Ashima Dyecot Ltd. (Misc. Civil Application No.239 of 2006

in Company Petition No.105 of 2006 in Company Application No.243 of 2006 decided on 10.11.2006).

30.12 The Petitioner Company humbly submits that the objections raised against the Scheme are baseless and without any substance. Moreover, almost all the similar objections have been discarded by various courts including the Hon'ble Supreme Court and this Court in a number of cases.

30.13 Therefore, the petitioner company submits before this Court that the prayers (a) to (h) sought in the petition be allowed and that the scheme be sanctioned.

OBSERVATIONS AND CONCLUSIONS: (Regarding Jurisdiction of the Court)`

31. This Court has considered the facts of

the case, objections raised by several objectors and also Company's reply to the objections. Before this Court considers the objections raised against the proposed scheme of amalgamation, this Court considers: (1) the parameters of the Court's jurisdiction regarding legality and validity of the scheme; (2) objections raised by several objectors and (3) Scheme of Sections 391 to 394 and the relevant aspects about the same.

RE: PARAMETERS OF COURT'S JURISDICTION:

31.1 In this regard I first rely upon the judgement of the Hon'ble Supreme Court in the case of HINDUSTAN LEVER EMPLOYEES' UNION VS. HINDUSTAN LEVER LTD. AND OTHERS reported in 83 Company Cases 30. The said judgement has been delivered by 3 Judges Bench (Coram: M.N. Venkatachaliah, C.J.I., R.M. Sahai and S.C. Sen, JJ). In this judgement Hon'ble Mr.

Justice M.N. Venkatachaliah, CJI and Hon'ble Mr. Justice S.C. Sen, have given one judgement (majority judgement) whereas Hon'ble Mr. Justice R.M. Sahai has given separate but concurring judgement.

31.2 As regards Court's jurisdiction I first rely on the judgement of Hon'ble Mr. Justice R.M. Sahai on page Nos. 37-38 which reads as under:

31.2A "But what was lost sight of is that the jurisdiction of the Court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A company court does not exercise an appellate jurisdiction. **It exercises a jurisdiction founded on fairness.** It is not required to interfere only because the figure arrived at by the

valuer was not as good as it would have been if another method had been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair for the shareholders of the company which was being merged. The court's obligation is to be satisfied that valuation which was in accordance with law and it was carried out by an independent body. The High Court appears to be correct in its approach that this test was satisfied as, even though the chartered accountant who performed this function was a director of TOMCO, he did so as a member of a renowned firm of chartered accountants. His determination was further got checked and approved by two other independent bodies at the instance of the shareholders of TOMCO by the High Court and it has been found that

the determination did not suffer from any infirmity. The company court, therefore, did not commit any error in refusing to interfere with it. May be, as argued by learned counsel for the petitioner, if some other method had been adopted probably the determination of valuation could have been a bit more in favour of the shareholders. But since admittedly more than 95 per cent of the shareholders who are the best judge of their interest and are better conversant with market trends agreed to the valuation determined it could not be interfered by courts as "certainly, it is not part of the judicial process to examine entrepreneurial activities to ferret out flaws. The court is least equipped for such oversights. Nor, indeed, is it a function of the judges in our constitutional scheme. We do not think

that the internal management, business activity or institutional operation of public bodies can be subjected to inspection by the court. To do so, is incompetent and improper and, therefore, out of bounds. Nevertheless, the broad parameters of fairness in administration, bona fides in action and the fundamental rules of reasonable management of public business, if breached, will become justiciable" [Fertilizer Corporation Kamgar Union V. Union of India (1981) 2 SCR 52 : (1981) 59 FJR 237, 257 (See: Buckley on the Companies Acts, fourteenth edition, pages 473 and 474 and Palmer on Company Law, twenty-third edition, para 79.16]" (Emphasis added)

31.3 In the same judgement the Hon'ble Supreme Court (i.e. same learned Judge) further observed at pages 39-40 as under:

"Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered into between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the Courts have evolved, the principle of "prudent business management test" or that the scheme should not be a device to evade law. But when the court is concerned with a scheme of merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximising the profits of the

shareholders or whether the interest of employees was protected but it has to ensure that the merger shall not result in impeding promotion of industry or obstruct the growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on the English decision for Hoare, In re (1933) All ER 105 (Ch D) and Bugle Press Ltd., In re (1961) Ch 270 that the power of the Court is to be satisfied only whether the provisions of the Act have been complied with or that the class or classes were fully represented and the arrangement was such as a man of business would reasonably approve between two private companies may be correct and may normally be adhered to but when the

merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The jurisdiction of the court in this regard is comprehensive.” (Emphasis added)

31.4 The majority judgement starts from pages 65-66 of the said judgement which reads as under:

“An argument was also made that as a result of the amalgamation a large share of the market will be captured by HLL. But there is nothing unlawful or illegal about this. The court will decline to sanction a scheme of merger, if any tax fraud or any other illegality is involved. But that is not the case here. A company may, on its own, grow to capture a large share

of the market. But unless it is shown that there is some illegality or fraud involved in the scheme, the court cannot decline to sanction a scheme of amalgamation. It has to be borne in mind that this proposal of amalgamation arose out of a sharp decline in the business of TOMCO. Dr. Dhavan has argued that TOMCO is not yet a sick company. That may be right, but TOMCO at this rate will become a sick company, unless something can be done to improve its performance. In the last two years, it has sold its investments and other properties. If this proposal of amalgamation is not sanctioned, the consequence for TOMCO may be very serious. The shareholders, the employees, the creditors will all suffer. The argument that the company has large assets is really

meaningless. Very many cotton mills and jute mills in India have become sick and are on the verge of liquidation, even though they have large assets. The scheme has been sanctioned almost unanimously by the shareholders, debenture holders, secured creditors, unsecured creditors and preference shareholders of both the companies. There must exist very strong reasons for withholding sanction to such a scheme. Withholding of sanction may turn out to be disastrous for the 60,000 shareholders of TOMCO and also a large number of its employees.” (Emphasis added)

31.4A. Further reliance is placed on the decision of the Hon'ble Supreme Court in the case of MIHEER H. MAFATLAL VS. MAFATLAL INDUSTRIES LTD. reported in (1997) 1 SCC 579.

In the aforesaid matter at paragraph No. 28 the Hon'ble Supreme Court has considered scope of interference by the Company Court in sanction proceedings. The Court has relied on Sections 391 to 394 of the Companies Act and thereafter relied on the passage of Buckley on the Companies Act, 14th Edition (page 473-474), then the judgements in the case of ALABAMA, NEW ORLEANS, TEXAS AND PACIFIC JUNCTION RLY. CO. [Re 1 (1891) 1 Ch. 213 : (1886-90) All ER Rep. Ext. 1143]; ANGLO CONTINENTAL SUPPLY CO. LTD. [Re (1922) 2 Ch 723 : 91 LJ Ch 658]; EMPLOYEES' UNION V. HINDUSTAN LEVER LTD. 1995 Supp (1) SCC 499 and ultimately on pages 601-602 the Hon'ble Supreme Court has observed as under: (per S.B. Majmudar, J)

31.4B “In view of the aforesaid settled legal position, therefore, the scope and ambit of the jurisdiction of the Company Court has clearly got

earmarked. The following broad contours of such jurisdiction have emerged:

1. The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by Section 391(1)(a) have been held.

2. That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by Section 391 sub-section (2).

3. That the meetings concerned of the creditor or members or any class of them had the relevant material to enable the voters to arrive at an

informed decision for approving the scheme in question. That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

4. That all necessary material indicated by Section 393 (1)(a) is placed before the voters at the concerned meetings as contemplated by Section 391, sub-section (1).

5. That all the requisite material contemplated by the proviso to sub-section (2) of Section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the Court gets satisfied about the same.

6. That the proposed scheme of compromise and arrangement is not

found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose underlying the Scheme with a view to be satisfied on this aspect, the Court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously X-ray the same.

7. That the Company Court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bona fide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising of the same class whom they purported to represent.

8. That the scheme as a whole is also found to be just, fair and reasonable

from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

9. Once the aforesaid broad parameters about the requirement of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise

amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction.

The aforesaid parameters of the scope and ambit of the jurisdiction of the Company Court which is called upon to sanction a Scheme of Compromise and Arrangement are not exhaustive but only broadly illustrative of the contours of the Court's jurisdiction.” (Emphasis added)

31.5 Reliance is further placed on the decision of the Hon'ble Supreme Court in the case of HINDUSTAN LEVER AND ANOTHER VS. STATE OF MAHARASHTRA AND ANOTHER reported in (2004) 9 SCC 438, particularly paragraph No. 12 on page 449 which reads as follows:

“para 12 – Two broad principles

underlying a scheme of amalgamation which have been brought out in this judgement are:

1. That the order passed by the Court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and

2. that the jurisdiction of the Company Court while sanctioning the scheme is supervisory only i.e. to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of compromise or arrangement is not violative of any provision of law, unconscionable or contrary to public policy. The court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the

compromise or arrangement arrived at between the parties. The role of the court is that of an umpire in a game, to see that the teams play their role as per rules and do not overstep the limits. Subject to that how best the game is to be played is left to the players and not to the umpire.

Both these principles indicate that there is no adjudication by the court on the merits as such."

31.6 In paragraph No. 32 on page 457 of the said judgement the Hon'ble Supreme Court has further observed thus:

"para 32 - In view of the aforesaid discussion, we hold that the order passed by the Court under Section 394 of the Companies Act is based upon the compromise between two or more

companies. Function of the court while sanctioning the compromise or arrangement is limited to oversee that the company were not conducted in a manner prejudicial to the interest of its members or to public interest, that is to say, it should not be unfair or contrary to public policy or unconscionable. Once these things are satisfied the scheme has to be sanctioned as per the compromise arrived at between the parties." (Emphasis added)

31.7 I also rely on Palmer's Company Law 25th Edition (1992) page 12035 where the learned author has discussed the scheme, "Exercise of the Court's discretion" at paragarph No. 12.026 to 12.030 where the learned author has stated that before the Court sanctions a scheme it will normally

need to be satisfied on four matters: (1) The statutory provisions must have been complied with; (2)The class must have been fairly represented; (3) The arrangement must be such as a man of business would reasonably approve; and (4) The arrangement must be compatible with Section 428.

31.8 Similarly Buckley on the Companies Act, (2001 Edition) under the heading “Function of the Court” at para 425.53 is relied on where it is stated as under:

> “Once the meetings have approved the scheme, the sanction of the Court must be sought. The sanction of the Court is not a formality. The Court has an unfettered discretion as to whether or not to sanction the scheme, but it is likely to do so, so long as: (1) the provisions of the statute have been

complied with, (2) the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and (3) that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve."

31.9 Further reliance is placed on Halsbury's Laws of England, 4th Edition, Vol. 7(2), pages 1092-1093 where under the heading "The Making of Schemes" at para 1447 Sanctioning compromise or arrangement it is stated as follows:

"If a majority in number representing

three-fourths in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court, is binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the Company.

The compromise proposed must be within the power of the company to effect, and, if not, its memorandum of association must be altered before the compromise will be approved.

> The interests of creditors must always be safeguarded; but in the case of a scheme which involves the application of the provisions of the Companies Act, 1985 for facilitating such reconstruction or amalgamations, the protection of the creditors is to be left to the procedure in relation to such provisions."

GUJARAT HIGH COURT DECISIONS:

31.10 As regards this High Court, I rely on the decision of this Court in the case of In re SIDHPUR MILLS CO. LTD., reported in AIR 1962 Guj. 305, the judgement was delivered by the Court (Coram: N.M. Miabhoy, J as he was then). The learned Judge has discussed various English cases at pages 308 to 311 in para 14 and in para 15 on page 311 the learned Judge has laid down the following principles:

"Para 15 – Therefore, in my judgement, the correct approach to the present case is (i) to ascertain whether the statutory requirements have been complied with, and (ii) to determine whether the scheme as a whole has been arrived at by the majority bona fide and in the interests of the whole body of shareholders in whose interests the majority purported to act, and (iii) to see whether the scheme is such that a fair and reasonable shareholder will consider it to be for the benefit of the Company and for himself. The scheme should not be scrutinized in the way of carping critic, a hair-splitting expert, a meticulous accountant or a fastidious counsel would do it, each trying to find out from his professional point of view

what loopholes are present in the scheme, what technical mistakes have been committed, what accounting errors have crept in or what legal rights of one or the other sides have or have not been protected. It must be tested from the point of view of an ordinary reasonable shareholder, acting in a business-like manner, taking within his comprehension and bearing in mind all the circumstances prevailing at the time when the meeting was called upon to consider the scheme in question. I am emphasizing the last point because an argument was made by Mr. Amin that certain circumstances or events which took place after the scheme had been considered should be taken into account. I do not wish to be understood to say that, in no case post facto circumstances or events

cannot be taken into account, but, on the whole I have come to the conclusion that, whilst, in some rare and exceptional cases, the Court may take into consideration subsequent events to protect the interests of the Company or the shareholders, as a general rule, the Court should consider the resolution on the footing of the circumstances which were in existence at the time when the scheme was formulated, deliberated upon and approved. If any other approach were to be made, then, in that case, there would be no sanctity about business contracts. In fact, such an approach may include interested persons to shape future events and circumstances in such a way as to convert a reasonable scheme into an unreasonable one." (Emphasis added)

31.11 Another judgement of this Court is In re MANECKCHOWK AND AHMEDABAD MANUFACTURING CO. LTD. reported (1970) 40 Company Cases 819, (D.A. Desai, J (as he was then) relevant pages 901-902 where the learned Judge has referred to para 15 of the aforesaid judgement (In re Sidhpur Mills Co. Ltd.) and ultimately held as under:

> "This must be the approach of the court while examining the scheme and the court should, keeping in view all the aspects of the matter, prefer a living scheme to compulsory liquidation bringing about an end to a company. Reference may be made to Lawrence Dawson V. J. Hormasji (reported in AIR 1932 Rang. 154, 162). Cunliffe J, has observed as under:
>
> `The Court is of course not a mere

machine for registration. It will look into the proposed scheme much as a court of appeal will canvass, if asked to do so, the decision of a jury, to ascertain if there was reasonable evidence to support their verdict; but it will, I think, always also prefer a living scheme to a compulsory liquidation bringing about an end to a company, and usually without any hope of payment in full.'

The Court in exercising its discretion under Section 391(2) must treat it as cardinal that its function does not extend to usurping the view of the members or creditors. It must look at the scheme to see that it is a reasonable one and while so doing, the court will be strongly influenced by a big majority vote and the reasons which actuated the contesting

creditors in opposing the scheme. None the less it is essential that the scheme must be a fair and equitable one though it is none of the business of the court to judge upon the commercial merits which in fact is the function of the creditors and members.” (Emphasis added)

31.12 I also rely upon the judgement of this Court in the case of BHAVNAGAR VEGETABLE PRODUCTS LTD., In re reported in 55 Company Cases 107. First I rely on the judgement of the learned Single Judge (Ahmadi, J (as he was then)). The learned Judge has referred to the judgement of this Court in Sidhpur Mills Co. Ltd.'s case (supra) in para 59 and in paragraph 60 the learned Judge has also referred to the judgement of this Court in In re Maneckchowk & Ahmedabad Mfg. Co. Ltd. [1970] 40 Comp. Cas. 819 (Guj). Paragraph No.

15 in Sidhpur Mill's case and paragraph 16 in Maneckchowk & Ahmedabad Mfg. Co. Ltd.'s case (supra) have been referred and ultimately in paragraph Nos. 63-64, this Court laid down the principle regarding sanctioning of the Scheme. Against the said judgement, appeal was filed and the Division Bench of this Court (Coram: M.P. Thakkar (as he then was) & R.C. Mankad, JJ) dismissed the appeal and approved the judgement of the learned Single Judge of this Court. Thus, the judgement in the case of Sidhpur Mill (supra) has been followed by this Court, learned Single Judge as well as the Division Bench.

31.13 I also refer to the Division Bench judgement of this Court (Coram: R.C. Mankad and P.M. Chauhan, JJ) in the case of JITENDRA R. SUKHADIA VS. ALEMBIC CHEMICAL WORKS COMPANY LTD. reported in 64 Company Cases 206, particularly relevant pages 215-216 where the

Court has observed as under:

> “With respect, we are in full agreement with the view of N.M. Miabhoy J (as he then was). (Re: Sidhpur Mills Co. Ltd. which I earlier referred to). xxxxxxxxxx It is only the resultant effect of the scheme which is required to be stated. As observed in Sidhpur Mills Co. Ltd., In re, AIR 1962 Guj. 305, if there is anything in the scheme of compromise or arrangement which is not quite obvious to a person reasonably acquainted with the facts of the case by merely reading the terms of the scheme, then a duty is cast upon the persons concerned to mention what the consequence will be if the scheme is approved of. If something is implied in the scheme which is not obvious, it

must be brought to the notice of the creditors and shareholders. In the instant case, the share exchange ratio is clearly mentioned in the scheme. In other words, it is made clear that in case the amalgamation of Neomer with the respondent company is approved, the shareholders of Neomer would be entitled to one share of the respondent company in exchange for 40 shares of Neomer. In what manner this exchange ratio was worked out is not a matter which was required to be stated in the statement contemplated under Section 393(1)(a). Once this effect of the scheme, namely, that the shareholders of Neomer, would, as a result of the amalgamation, get one share of the respondent company in exchange for 40 shares of Neomer was stated, there was sufficient

explanation of the effect of the scheme to the shareholders of the respondent company so far as the share exchange ratio is concerned. How the share exchange ratio was worked out was not the “effect” of the scheme; but a detail, which was not required to be stated in the statement. Once the share exchange ratio was clearly stated, the shareholders of both the companies, that is, the respondent company and Neomer, would be put on alert, if they had any doubt regarding the share exchange ratio and the working thereof. Once the effect of the scheme is explained, the duty cast under clause (a) of section 393(1) is discharge and nothing more was required to be done for complying with the said provision. We, therefore, find ourselves unable to accept Mr.

Pujara's contention that in the absence of details regarding working of the share exchange ratio in the statement, there was failure on the part of the persons concerned to comply with the provisions of clause (a) of Section 393(1) of the Companies Act; and, consequently, the shareholders of the respondent company could not arrive at an informed decision whether or not to approve the scheme of amalgamation.” (Emphasis added).

31.13A BANK OF BARODA LTD. VS. MAHINDRA UGINE STEEL CO. LTD. reported in 46 Company Cases 227 where at pages 244 the Court has observed as under: (per P.D. Desai, J (as he was then))

“In view of the foregoing discussion

it appears to me that the Court cannot abdicate its duty to scrutinise the scheme with vigilance and act as a mere rubber stamp simply because the statutory majority has approved it and there is no opposition to the scheme in the court. So much weight cannot be attached to the views of the statutory majority as to require the court to mechanically put its imprimatur on the scheme. The Court is not upon a casual look at it. It must still scrutinise the scheme to find out whether it is a reasonable arrangement which can by reasonable people conversant with the subject be regarded as beneficial to those who are likely to be affected by it. In the pursuit of such inquiry, the Court is not tied down by any rigid principles or strait-jacket formula and no enumeration contained

in judicial decisions of the factors which can be taken into account, howsoever precise, can be treated as exhaustive so as to limit the scope of the inquiry which having regard to the varying circumstances, might differ from case to case. The burden lies on the petitioner-company to show that the scheme of amalgamation is fair, reasonable, workable and such that a man of business would reasonably approve. The court would, of course, take into account the fact that it has been approved by a big majority vote, but it would not shirk its duty to scrutinise the scheme, especially when it involves amalgamation of large companies in which many interests are at stake."

31.14 This Court also refers to the

judgement of my learned brother Mr. Justice D.A. Mehta in the case of RELIANCE PETROLEUM LIMITED VERSUS UNION OF INDIA reported in 2002(0) GLHEL 210579 (Company Petition No. 75/2002 decided on 13.9.2002 wherein at paragraph No. 22 the learned Single Judge has observed as under:

> “The position in law is well settled that while exercising the jurisdiction and power to sanction a Scheme, the Court is required to ensure that statutory provisions have been complied with, that the class of persons who attended the meeting was fairly represented and that the statutory majority was acting bona fide and lastly that the arrangement i.e. Scheme was such which an intelligent and honest man, acting in respect of his interest, might

reasonably approve. The Court, at the same time, is not required to differ from the decision of the majority arrived at the meeting unless any of the factor was found to be wanting. A share exchange valuation will have to be approved unless it shocks the conscience of the Court." (Emphasis added)

31.15 This Court also further refers to the decisions of this Court (Coram: N.G. Nandi, J) in the case of In Re: ARVIND MILLS LTD.; (Coram: Anant S. Dave, J) in the case of TORRENT POWER AEC LTD., In re. reported in (2007) 138 Comp Cas 139 (Guj) and (Coram: R.S. Garg, J) in the case of CORE HEALTH CARE LTD., In Re.

31.16 All the above judgements of the learned Single Judges of this Court have taken

same and similar view.

SCOPE OF INTERFERENCE OF COURT IN AMALGAMATION MATTER:

Re.: English Court Approach

32.1 The first decision is In re Alabama, New Orleans, Texas and Pacific Junction Railway Company, reported in 1891 Law Reports (Chancery Division) (Ch.1), page 213, relevant page 238 (per Lindley, J).

> "I think that is very likely, but, still, there is the statute, and what the Court has to do is to see, first of all, that the provisions of that statute have been complied with; and, secondly, that the majority has been acting bona fide. The Court also has to see that the minority is not being

overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce. Further than, that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly, and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by business men. The Court must look at the scheme, and see whether the Act has been complied with, whether the majority are acting bona fide, and whether they are coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and then see whether the scheme is a reasonable one or whether there is any reasonable objection to

it, or such an objection to it as that any reasonable man might say that he could not approve of it.

32.2 Similar view has been also expressed in, In re Anglo-Continental Supply Company Limited, reported in 1922 Law Reports (Chancery Division) (Ch.2), page 723, relevant page 736.

> “In exercising its power of sanction under section 120 the Court will see: First, that the provisions of the statute have been complied with. Secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to

represent, and, Thirdly, that the arrangement is such as a man of business would reasonably approve".

32.3 From the aforesaid two English cases namely, In Re Alabama, New Orleans, Texas and Pacific Junction Railway Company and Anglo-Continental Supply Company Limited where the Court has referred to Treaties of Buckley, 9th Edition, 275 and laid down the principle regarding parameters of Court's jurisdiction. In the earlier part of this judgement, this Court has relied on Palmers on Company Law as well as Buckley on Companies Acts, 2000 at para 425.53. If one examines the said para then the aforesaid two cases have been followed by several English cases subsequently and the last case is RAC Motoring Services Ltd. (2000) 1 BCLC 307.[Re.: Buckley on the Companies Law, 2000 Edn. Para 425.53.]

OBSERVATION & CONCLUSION REGARDING ANCILLARY INDUSTRIES.

33.1 This Court has considered the submissions made by Mr.P.R. Thakkar, learned advocate who appears on behalf of Rachana Polypack as well as Schon Plastic Pvt. Ltd. Mr.Shalin Mehta, learned advocate has also supported him in this behalf. Mr. K. S. Nanavati, learned Senior Counsel has replied to the said submissions in this behalf. This Court has considered the tender notice for inviting application for establishing ancillary industries and letter of intent issued by IPCL. This Court also considered the provisions of Industries (Development and Regulation) Act, 1951, which has been referred to by the learned counsel in this behalf. It appears that the ancillary industry filed a petition before the Bombay High Court claiming relief that the High Court may issue a writ

of mandamus to the respondents particularly respondent No. 4 IPCL to comply with the commitments that IPCL/respondents have made to the petitioners through their Letter of Intent dated 9.10.1992 and other reliefs and the Bombay High Court has passed the order that relief which the petitioner in that petition who is applicant herein before this Court as claimed can be claimed either in Civil Court or in conciliation, mediation or arbitration. Accordingly, the applicant has filed application for resolving dispute by arbitrator as suggested by Bombay High Court.

33.2 As per the order of the Bombay High Court dated 17.2.2005 where the Bombay High Court held that appropriate remedy for the reliefs claimed in the said petition lies before the Civil Court of appropriate jurisdiction. The applicant has filed suit one before the Baroda Court against IPCL for

specific performance of contract and alternative claim for damages and also another in Raighad Civil Court. Before this Court, the learned counsel has also relied upon the proceedings of Civil Court.

33.3 In terms of Clause 6 of the Scheme, upon amalgamation becoming effective, all the suits and legal proceedings pending by or against IPCL would be continued by or against the Transferee Company and whatever the applicant obtained by way of decree or relief either from Baroda Court or from Raighad Court, the same will be binding upon the Transferee Company. The applicants have apprehended in one matter that they have filed a suit in Baroda Court on the ground that the registered office of IPCL is situated at Baroda, however in view of amalgamation, the Transferee Company will cease to have registered office at Baroda and the Transferee

Company has its registered office situated at Mumbai. If this happens, the trial Court at Vadodara may lose the jurisdiction. This Court has considered the said objection in this behalf. In my view the entire objection of the applicants is misplaced. In view of Clause 6 of the Scheme, whatever proceedings have been filed by the applicant in Baroda Court as well as Raighad Court, and if any decree is passed, the same will be binding on the Transferee Company.

33.4 As regards losing of the jurisdiction, one has to refer to Section 20 of the Code of Civil Procedure which provides subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of <u>whose jurisdiction, the cause of action, wholly or in part arises</u> or the defendant carries on business.

33.5 It is well settled principle of law that cause of action means a right to sue. It consists of material facts which are imperative for the plaintiff to allege and prove. The cause of action may be described as “a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed”, or “which gives the plaintiff right to relief against the defendant”. In this behalf this Court relies upon the judgment of Hon'ble Apex Court in the case of A.B.C. Laminart Pvt. Ltd. vs. A.P. Agencies reported in (1989) 2 SCC 163 : AIR 1989 SC 1239. According to Hon'ble Supreme Court, the cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the

defendant. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. The said judgment also provides that the cause of action has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.

33.6 Moreover, a company is considered to be carrying on its business at the place where its registered office is situated in addition to other places. As such, the Court where its registered office is situated has jurisdiction to try the suit. The question whether a court has jurisdiction is to be decided on the facts that exist at the time when the suit is filed and if, the Court has jurisdiction accordingly, any subsequent change in the facts cannot divest it of its jurisdiction.

Thus, in the present case, when the Vadodara Court or Raigadh Court has jurisdiction at the time when the suit was filed since the registered office of the Company was situated within it, any subsequent change in the registered office will not defeat the suit nor will it divest the court of its jurisdiction which it had when the suit was filed.

33.7 It is directed by way of clarification that the Civil Suits filed by the ancillary industries against the transferor Company both at Vadodara Court in Gujarat and Raighad Court in Maharashtra shall be continued against the transferee Company after amalgamation order. The final decree (i.e. subject to challenge by the either party) that may be passed by the concerned Courts shall be binding on the transferee Company.

OBSERVATION & CONCLUSION RE: SC/ST RESERVATION:

34.1 This Court heard the submissions of Mr.Ramnandan Singh on behalf of some of the employees who belong to IPCL. This Court has also gone through Article 16(4) of the Constitution of India which provides that this it shall not prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens, which, in the opinion of the State, is not adequately represented in the services under the State and Article 16(4A) provides that it shall not prevent the State from making any provision for reservation or classes of posts in the service under the State in favour of the Scheduled Castes and the Scheduled Tribes, which in the opinion of the State, are not adequately represented in the services under the State.

34.2 It appears some of the said employees have filed a petition before this Court regarding objection on amalgamation of the transferor Company, i.e. IPCL with the transferee Company, i.e. RIL. In that matter, this Court has passed an order on 8th May 2007 and directed them to make representation to the Government. In the event their rights are prejudiced, they can approach appropriate forum.

34.3 This Court has been informed that pursuant to the order of this Court, the employees have filed representations dated 5.6.2007 to the Central Government in connection with their objection to the merger or transfer of the transferor Company with the transferee Company.

34.4 It is no doubt true that the

petitioner Company has objected to the said part, but if this Court directs that when the Central Government decides the representation of the SC/ST, the petitioner Company as well as transferee Company may be heard and they may put forward their case and after hearing the petitioner Company, IPCL or RIL after amalgamation, if the Central Govt. passes any order, the same will be binding on the workers as well as the transferee Company. However, it is directed by way of clarification that while considering the objections filed by the SC/ST employees dated 5.6.2007 before the Ministry of Chemicals and Petrochemicals, the said authority will pass order after hearing the said employees and also the transferee Company. The authority will pass a reasoned order. Such order will be subject to challenge by the either party before the appropriate forum in appropriate proceedings and the finally adjudicated order will be binding on

the parties.

OBSERVATIONS & CONCLUSIONS RE: WORKERS MATTER.

35.1 The question whether the workers have right to be heard in connection with the scheme of amalgamation – in that connection this Court considered Sections 391 to 394 of the Companies Act. The said Sections provide consultation with the secured creditors, unsecured creditors and shareholders. They do not provide any consultation or hearing of the workers before the scheme of amalgamation is considered by two respective Companies particularly by transferor company and transferee Company also.

35.2 Over and above this, the Court has considered the relevant Rules of Company (Court) Rules. As regards compromise, arrangement or amalgamation, there are Company

(Court) Rules – Rule 67 provides for summons for directions to convene a meeting, an advertisement must be in Form No. 33 and affidavit in support thereof in Form No. 34. Rule 69 provides for directions at hearing of summons which provides that the Company has to obtain directions in connection with determining the class or classes of creditors and/or members whose meeting or meetings have to be held for considering the proposed compromise or arrangement; fixing the time and place of such meeting or meetings; appointing a Chairman or Chairmen for the meeting or meetings to be held, as the case may be; fixing the quorum and the procedure to be followed at the meeting or meetings including voting by proxy; determining the values of the creditors and/or the members, or the creditors or members of any class, as the case may be, whose meetings have to be held; notice to be given of the meeting or meetings and the

advertisement of such notice; the time within which the Chairman of the meeting is to report to the Court the result of the meeting; and such other matters as the Court may deem necessary. It is no doubt true that these Rules provide for meetings of secured creditors and the members. Rule 73 of the Company Court Rules provides for notice of meeting. Rule 74 provides for advertisement of the notice of meeting. Rule 75 provides for copy of compromise or arrangement to be furnished by the Company, Rule 76 provides for affidavit of service, Rule 77 provides for result of the meeting to be decided by poll, Rule 78 provides for report of the result of the meeting, Rule 79 provides for petition for confirming compromise or arrangement; Rule 80 provides for date and notice of hearing and Rule 81 provides order on petition. Rule 82 provides application for directions under Section 394, Rule 83 provides for directions

at hearing of application, Rule 84 provides for order under Section 394. Rule 86 provides for report on working of compromise or arrangement; Rule 87 provides for liberty to apply. All these Rules show that regarding amalgamation various notices and advertisements have to be published.

35.3 In view of this, a conjoint reading of the Act and the Rules also provides that the workers have no right to be heard or consulted before or at the time the scheme of amalgamation is discussed by the Company.

35.4 Whether the workers can be heard when the scheme is sanctioned by the Court? This Court has stated in the earlier part of the order when the petition for amalgamation is filed the Court has ordered that the Company should advertise the matter in two newspapers regarding amalgamation. At this juncture this

Court refers to Rule 25 of the Company (Court) Rules which provides for the contents of advertisement which is general and it provides for the nature of advertisement which must be in the form of Form No. 5. When such type of advertisement has been published in the newspaper any person including the worker has right to object to the amalgamation.

35.5 In view of this when the scheme is presented before this Court by virtue of the advertisement, any person including worker has right to be heard and in fact the workers have objected to the scheme before this Court. The transferor Company has not objected to the same and therefore this Court is of the view the workers have right to object against sanctioning of the scheme by the Court. The learned sr. counsel has relied on several judgements in connection with public interest which I am going to discuss while considering

the question of public interest. Those judgements also support his submission that the workers have right to be heard when the scheme is sanctioned by this Court. It is no doubt true that learned sr. counsel has pressed into service the judgement of **National Textile Workers' Union vs. Ramkrishnan reported in AIR 1983 SC 75** but the said decision was in connection with winding up of the Company where the workers' right is completely lost, so in that context the Hon'ble Supreme Court has held that the workers have right to be heard in winding up petitions particularly Court passes any order regarding winding up of the Companies. In this case the workers' right are not lost totally. Only their rights have been altered and therefore the said decision may not help the ld. sr. counsel. However, the decision definitely helps the case of workers regarding public interest and therefore not only on

provisions of Rule 24 and Rule 25 but even on the question of public interest the workers have right to be heard.

WORKERS RIGHTS IN CONNECTION WITH ARTICLE 43A OF THE CONSTITUTION:

36.1 Article 43A has been introduced by the Constitution (Forty Second Amendment) Act, 1976 with effect from 3.1.1977. The importance of Article 43A has been referred to by the Hon'ble Apex Court in the case of National Textile Workers Union Vs. P.R. Ramakrishnan reported in AIR 1983 SC 75 where the Hon'ble Supreme Court has held that in view of the Preamble, the directive principles of State Policy and particularly, the introduction of Article 43A, it is idle to contend that the workers have no voice in proceedings for winding up of a company. Workers of a company and their trade Unions have the locus standi

to appear and be heard. The Hon'ble Supreme Court in the case of Navnit R. Kamani Vs. R.R. Kamani reported in (1988) 4 SCC 387 endorsed for the first time in that case a scheme for the running of the company by workers which had been approved by the Board of Industrial and Financial Reconstruction. The Hon'ble Supreme Court in the case of All India Bank Officers Confederation Vs. Union of India reported in (1989) 4 SCC 90 considered the Circular permitting the Government to disregard the recommendation of the representative union for appointment to the Board of Directors of a nationalized bank and held that to be ultra vires Article 43A of the Constitution. All these cases show that Article 43A has very important role to play and as far as this case is concerned, in view of Article 43A and all these decisions, the workers have rights to be heard and in fact they have been heard by this Court at the time

of sanctioning of the scheme of amalgamation.

36.2 Section 25FF of the Industrial Disputes Act provides for rights of the workers of the transferor company. Their consent to the transfer is not necessary. They have even no right to demand their absorption in the transferee company. If the new employer is not prepared to protect the existing service conditions and continuity of service, the only right of the employees of the transferor company is as specified in Section 25FF(1) of the Industrial Disputes Act. Indisputably, in Clause 8 of the Scheme, a provision has been made for protection of the service conditions and continuity of service, and therefore, there is no “deemed retrenchment” of the workmen. Section 25FF of the Industrial Disputes Act, which provides for transfer of ownership or management of an undertaking does not provide that even in case

where transferee employer protects the service conditions and continuity of service and a workman still desires not to join the service of the transferee employer, such workmen should be entitled to anything more than what an employee gets on voluntary relinquishment of his service. In absence of such statutory or legal right and none has been pointed out, the question of making any such provision in the Scheme does not arise. In fact, Section 25FF has been enacted to avoid termination of service which would result on transfer of undertaking and for the benefit of the workmen.

36.3 The learned sr. counsel, has relied on Section 3A, 3B of the Industrial Disputes Act where provision of Joint Management Council and functions of the Council has been provided. I see considerable force in the submission of the learned sr. counsel because

by similar Sections 53A and 53B as amended by Bombay Industrial Relations (Gujarat Amendment) Act along with Rules the State Government introduced Labour Management participation scheme. The intention of the Legislature is to assist the management to run in efficient, orderly and economic manner. The said provision was challenged before this Court and the Division Bench of this Court (Coram: J.B. Mehta and A.D. Desai, JJ (as they were then)) in the matter of MONOGRAM MILLS LTD., AHMEDABAD & ANR. VS. STATE OF GUJARAT reported in (1976) 17 GLR p. 265 has held that Sections 53A and 53B do not suffer from vice of excessive delegation and labour disputes and labour welfare fall in the State list – Labour participation in management of controlled Industries would not change its nature. Such measure would remain labour welfare measure and, therefore, State Legislature is competent to pass such

legislation.

REGARDING CLAUSE 8:

36.4 During the course of his arguments, Mr.K.S.Nanavati, learned Senior Counsel who appeared on behalf of the petitioner Company clarified that there is no compulsion under the Scheme on the workers to join the new employment. It has been pointed out that relief in para 28(e) of the petition is intended to ensure that there is a continuity of service. Existing employees have an option not to join the service of the transferee company and leave the service and therefore the provision that if the relief as prayed for in para 28(e) is granted, the existing workforce will forcibly have to join the service of the transferee company is misplaced.

36.5 Clause 8 of the Scheme does not foreclose this right of the workmen in any manner. What Clause 8 of the Scheme provides is that “by virtue” of the Scheme, the employees of the transferor company shall not be entitled to the employment policies or any schemes or benefits that may be applicable and available to the employees of the Transferee Company. This does not obviously take away the rights of the employees on becoming the employees of the transferee company to raise such demands or disputes or claim benefits on whatever ground that may be permissible under the law, as the employees of the Transferee Company. Such demands if raised, would be adjudicated by the authorities under the Industrial Law. However, the transferee Company will not object solely on the ground that they are employees of IPCL and not RIL. The present scheme does not and cannot take away the statutory rights of the workmen under

the Industrial Law.

36.6 Thereafter, I considered the relevant decisions in connection with the aforesaid aspect. This Court discussed the judgment in the case of **Hindustan Lever Employees Union vs. Hindustan Lever Limited and another reported in 1995(83) Company Cases 30** particularly on page 64 the Court has observed like this:

> “Next it was urged on behalf of the employees of TOMCO that the scheme will adversely affect them. This argument is not understandable. The scheme has fully safeguarded the interest of the employees by providing that the terms and conditions of their service will be continuous and uninterrupted and their service conditions will not be prejudicially affected by reason of the

scheme. The grievance made, however, is that there is no job security of the workers, after the amalgamation of the two companies. It has been argued that there should have been a clause in amalgamation of the two companies. There was no assurance on behalf of the TOMCO that the workers will never be retrenched. In fact, the performance of TOMCO over the last three years was alarming for the workers. It cannot be said that after the amalgamation they will be in a worse position than they were before the amalgamation.

We do not find that the amalgamation has caused any prejudice to the workers of TOMCO. The stand of the employees of HLL is equally incomprehensible. It has been stated that if the TOMCO employees continue

to enjoy the terms and conditions of their service as before, then two classes of employees will come into existence. The terms and conditions of HLL employees were much worse than those of TOMCO employees. If these are two sets of terms and conditions under the same company, then a case of discrimination will arise against the HLL employees.

We do not find any substance in this contention. The TOMCO employees will continue to remain on the same terms and conditions as before. Because of this arrangement, it cannot be said that prejudice has been caused to HLL employees. They will still be getting what they were getting earlier. TOMCO employees who were working under better terms and

conditions, will continue to enjoy their old service conditions under the new management.

Fear has been expressed both by TOMCO employees as well as HLL employees that the results of the amalgamation would necessitate streamlining of the operations of the enlarged company and the workers will be prejudiced by it.

No one can envisage what will happen in the long run. But on this hypothetical question, the scheme cannot be rejected. As of now, it has not been shown how the workers are prejudiced by the scheme." (Emphasis added)

36.7 This Court refers to and relies upon

the judgment of the Hon'ble Supreme Court in the case of **AIR 1961 SC 627 (Jeshtamani Gulabrai Dholakia and ors. v. Scindia Steam Navigation Co., Bombay...),** and particularly, para 10 on page 630, which reads as under:

> “para 10 - We are of opinion that there is no force in any of these contentions. Sec. 20(1) lays down that every officer or employee of the "existing air companies" employed by them prior to the first day of July of 1952 and still in their employment immediately before the appointed day shall become as from the appointed day an officer or employee, as the case may be, of the Corporation in which the undertakings are vested. The object of this provision was to ensure continuity of service to the employees of the "existing air companies" which

were being taken over by the Corporation and was thus for the benefit of the officers and employees concerned. It is further provided in S. 20(1) that the terms of service etc. would be the same until they are duly altered by the Corporation..... Further there was no compulsion on the employees or the officers of the "existing air companies" to serve the Corporation if they did not want to do so. The proviso laid down that any officer or other employee who did not want to go into the service of the Corporation could get out of service by notice in writing given to the Corporation before the date fixed, which was in this case July 10, 1953. Therefore, even if the argument of Mr. Chatterjee that the contract of service between the appellants and

their employers had been transferred or assigned by this section and that this could not be done, be correct, it loses all its force, for the proviso made it clear that any one who did not want to join the Corporation, was free not to do so, after giving notice up to a certain date."

36.8 After referring to the judgement in the case of Nokes v. Doncaster Amalgamated Collieries Ltd., 1940 AC 1014 the Hon'ble Supreme Court has further observed as under:

"This observation itself shows that a contract of service may be transferred by a statutory provision; but in the present case, as we have already said, there was no compulsory transfer of the contract of service between transfer of the contract of service

between the "existing air companies" and their officers and employees to the Corporation for each of them was given the option not to join the Corporation, if he gave notice to that effect. The provision of S. 20(1) read with the proviso is a perfectly reasonable provision and, as a matter of fact, in the interest of employees themselves."

36.9 This Court also relies upon the judgment of this Court in the case of **Gujarat Nylons Limited vs. Gujarat State Fertilizers Co. Ltd., reported in 1992(1) GLH 637 (Per: C.K.Thakker,J.)(as he was then).** In para 27 the learned Judge has observed as under:

"I have heard Mr.K.S.Zaveri, the learned Counsel appearing for the employees of the transferor Company at

length. However, I do not find any substance in any of the contentions raised by him. In my opinion, conjoint reading of Sections 391 and 394 of the Act make it amply clear that the workmen of the Transferor Company have no legal or statutory right of holding meeting and to express their opinion on the question of amalgamation. There is no statutory provision to that effect. No judgment has been shown to me wherein such a view has been taken by the Court that a meeting of the workmen is a condition precedent in the proceeding of amalgamation of scheme under Section 394 of the Act." (Emphasis added)

36.10 The learned Judge in Gujarat Nylon's case (supra) has also relied upon the judgment

of **National Textile Workers' Union vs. Ramkrishnan reported in AIR 1983 SC 75.** The Hon'ble Supreme Court in NTC case has held that so far as winding up petition is concerned, the workers had locus standi. In para 30 this Court has observed like this:

> "In my opinion, however, the said judgment (i.e. NCT's case)is not helpful to Mr.Zaveri since it cannot apply to the facts of the case on hand. As stated by me earlier, the statute does not empower or authorise the employees to object amalgamation. It also does not provide that workmen must be a party to the amalgamation proceedings. It is on the basis of the extended principles of natural justice that in certain circumstances, courts have interpreted certain provisions granting locus to a class

of persons who are likely to be adversely affected thereby. Again, in my view, Mr. Raval appears to be right when he submits that at the most from the observations made in Mr. P.R. Ramkrishnan's case (i.e. NTC case) (supra), it can be said that even the workmen of the Transferor Company have locus to express their view in this Court when the proceedings under Sections 391 and 394 are pending. He has submitted that in the instant case, that has been done. They have appeared through their Counsel and they are heard by this Court and the transferee Company had not taken any objection against the locus standi of the employees of the transferor Company. It is, however, not necessary that a meeting of the workers is a condition precedent

before a scheme of amalgamation is submitted and that if such a meeting is not held, the petition of amalgamation is not maintainable at law. Mr. Raval also appears to be right in submitting that when this Court has in fact heard the objections raised on behalf of the workmen of the transferor Company, the principles of natural justice have been complied with." (Emphasis added)

36.11 In that case on behalf of workers reliance was placed in the judgment of **Nokes vs. Doncaster Amalgamated Collieries Limited reported in 11 Company Cases 83** and also judgment of Hon'ble Apex Court in the case of **Jawaharlal Nehru University vs. K.S.Jawatkar reported in AIR 1989 SC 1577.** After referring to the said judgments, the learned Judge in paras 33 and 36 has observed as under:

“Almost an identical question arose in the case of Jeshtamini Gulabrai Dholakia v. Schindia Steam Navigation Co., reported in 1961 SC p.627. In that case, under the provisions of Section 20 of the Air Corporations Act, 1953, an order of transfer of contract of services of employees of the existing company to the corporation was passed and an option was granted to any officer or other employees who did not want to join the services of the Corporation, to get out of service by giving notice in writing to the corporation before the prescribed date. The Supreme Court held that if the employees of the existing company fail to exercise option given to them under the proviso to Section 20(1) of the Act, they

would be governed by provisions of Section 20(1) of the said Act thereby becoming employees of the new company. I am in respectful agreement with the view expressed by the Supreme Court in Jeshtamini's case (supra). The underlying object of such a provision is that no one can compel an employee to serve with a particular employer against his wish. Therefore, it may happen that though particular employee may be willing to serve the transferee Company, i.e. GSFC. But such an objection can only be raised if such employee or a class of employees of the transferor Company are compelled to work with the transferee Company. If they are not compelled to join the transferee Company, in my opinion, they cannot have any grievance on the scores that

such an auction was taken or an order was passed behind their back or without their consent, since even after the action or order they are at liberty not to join the transferee Company." (Emphasis added)

"Mr. Zaveri further contended that if there is amalgamation of transferor Company with the Transferee Company and if the workmen of the transferor Company are deemed to be workers of the transferee Company with effect from a particular date, all the workmen can be said to be only of one company, i.e. Transferee Company from that date. They cannot, therefore, be treated unequally, and there should not be any discrimination between the workers similarly situated. Mr. Raval, on the other hand, has submitted that this is not a question

which can be agitated, dealt with or decided in the present proceedings by the company court. In amalgamation proceedings, interests of the workmen are required to be protected at the time of amalgamation as held by Division Bench of this Court in Jitendra Sukhadia v. Alembic Chemical Works Co. reported in 64 Company Cases 206. He also submitted that the classification can always be made on the basis of geographical situation of the Unit, educational qualifications of the workmen, nature of work to be performed by the employees, and the like. The Company Judge in the exercise of powers under Sections 391 and 394 of the Act is not concerned with all these matters. It is always open to the workers of the Company if they feel aggrieved by any action of the Company to raise a demand, dispute

or claim in an appropriate proceeding. On the ground of potential liability, sanction cannot be refused. In this connection, Mr. Raval drew my attention to the decision of the Supreme Court in the case of Union of India v. Alembic Sarabhai Enterprise, reported in 55 Company Cases 623 and of the Karnataka High Court in the case of Mysore Electrical Works Ltd. v. I.T.O., Bangalore, reported in 52 Company Cases 32. In the latter case, it was specifically held by the High Court of Karnataka that the direction by the Company Court cannot relate to matters outside the scheme and obviously it is so. When the Company Court exercises jurisdiction under the Act, it has to decide the matter in accordance with the provisions of that Act. It is neither deciding any question nor expressing any opinion on

the points which do not strictly fall within the purview of the Scheme of amalgamation. Therefore, if the employees of the transferee Company feel aggrieved in connection with payment of wages or other conditions of service, it is always open to them to approach an appropriate forum in accordance with law and all those questions will be decided in those proceedings. Granting of sanction of amalgamation of companies by this court would not come in the way of workmen, while deciding the question which may be raised in those proceedings. Even though this legal position is abundantly clear, Mr. Raval stated that if the employees of the transferee company feel aggrieved, they can approach an appropriate forum if so advised and those proceedings will be disposed of in accordance with

law by appropriate authorities under the relevant statutes.” (Emphasis added)

36.12 This Court has inquired in the office and this Court has been informed that against the judgment in Gujarat Nylons Limited and Gujarat State Fertilizers Co. Ltd., in Company Petition Nos.143 and 144 of 1990 decided by this Court (Coram: C.K. Thakker, J. (as he was then) dated 7.3.1991, O.J. Appeal No.3/91 was filed by Gujarat Nylons Employees Union and O.J. Appeal No.4/91 was also filed by Gujarat Nylons Employees Union through their learned advocate and these two appeals reached hearing before this Court (Coram: G.N. Ray, CJ. (as he was then) and R.K. Abichandani, J.) and the Division Bench of this Court disposed of the appeals by order dated 15.3.1991 and confirmed the judgment of learned Single Judge. [However, copy of the order is not available].

36.13 Similar situation arose in the case of Narmada Chematur Petrochemicals Limited in Company Petition No.147 of 2006 and other connected matters decided by this Court (Coram: M.R.Shah, J.) on 9.1.2007. After referring to the aforesaid Gujarat Nylon's case (supra) on page 28 the learned Judge has observed like this:

> "Thus, considering the decision of this Court in the case of *Gujarat Nylons Ltd.,[supra],* if there is any disparity of the pay-scales of employees of two companies or two divisions, post merger, it will be open for the employees of the erstwhile NCPL to raise industrial dispute under the Labour Laws before the appropriate forum which can be adjudicated by the appropriate forum

after taking appropriate evidence and after hearing all the parties in accordance with law".

36.14 Last contention regarding grievance is that they were not consulted in the process of negotiations and their consent was not taken to the Scheme of Amalgamation. Reference may be made to AIR 2006 SC 2056 para 10 which reads as follows:

> "10. Elaborate arguments were advanced on the question as to whether an employee's consent is a must under Section 25FF of the Act. The common law rule that an employee cannot be transferred without consent, applies in master – servant relationship and not to statutory transfers. Though great emphasis was laid by learned counsel for the respondent on

Jawaharlal Nehru University v. Dr.K.S. Jawatkar and others [1989 (supp) 1 SCC 679], a close reading of the judgment makes it clear that the common law rule was applied. But there is not any specific reference to Section 25FF or its implication. There is nothing in the wording of Section 25FF even remotely to suggest that consent is a pre-requisite for transfer. The underlying purpose of Section 25FF is to establish a continuity of service and to secure benefits otherwise not available to a workman if a break in service to another employer was accepted. Therefore, the letter of consent of the individual employee cannot be a ground to invalidate the action."

36.15 Consent of the workers of the

transferor company to the Scheme of Merger, therefore is not necessary.

36.16 So far as the rights of the workers subsequent to amalgamation are concerned, it is well settled that it is always open to the workers to be employees of the transferee company, to raise such demand, to claim such benefit and raise such disputes as may be permissible under the Industrial Law.

36.17 So far as Rule 8 is concerned, the learned sr. counsel has made very forceful submissions. However, once this Court holds that so far as previous employees of IPCL are concerned, even after merger, their rights and interest are to be protected by the transferee Company and their conditions of service have not to be prejudicially affected by the transferee Company. Once this Court has

directed that the same is in consonance with the judgement of the Hon'ble Supreme Court in the case of Hindustan Lever Limited (supra), the contention of the learned sr. counsel that clause 8 of the scheme of amalgamation be struck down cannot be accepted.

36.18 So far as clause 8 regarding compulsion is concerned, this Court has already observed that as per the concession given by the learned counsel for the transferee company that all the employees of the transferor company will be given an option of two months either to join or not to join with the transferee company. If they desire they can exercise their option. If they do not want to join the transferee Company, they may not join the transferee company. This clause of option is given only with a view to mitigate the hardship of the employees so they may not be compulsorily transferred to

transferee company.

36.19 As regards future rights are concerned, it is no doubt clear that clause 8 has provided all the previous employees of IPCL who exercise the option and decide to join the transferee company by clause 8 which provides that they are not entitled to the benefits of the transferee company. However, this has been stated because they are allowed to enjoy whatever the benefits they were enjoying by the transferee company. However, this Court hopes and trusts that in future if the employees raise any demand after forgoing their benefits which they were enjoying from the transferor company against the transferee company, this Court hopes and trusts the transferee company will consider their demands. If it is referred to Industrial Court for adjudication, the concerned Court will consider the same.

36.20 If one sees the Financial Highlights – 10 years at a Glance for the periods 1996-97 to 2005-2006 which is a part of this judgement at Annexure-A it shows that in 1996-97 there were 13,013 employees whereas in 2001-2002 there were 13,740 employees and in 2005-2006 there are 14,274 employees. Now as contended by the learned sr. counsel Mr. Patel all the three unions have 5000 employees who oppose the scheme of amalgamation. So if one considers that out of 14,274 employees, 5000 employees are opposing the scheme, so at least more than 50% employees are not opposing the scheme and they are supporting the scheme. This is also one of the factors which this Court has considered for sanctioning the scheme.

RE: PUBLIC INTEREST & PUBLIC POLICY:

37.1 This Court has considered the submissions of learned counsel for the applicant and the company. Once the company merges, all particular items of assets and liabilities also get merged. The contention of applicant that Transferee Company has decided to misuse or wipe out the Transferor Company is baseless and without any substance. There is no material produced in this behalf. The contention that the Transferee Company desires to misutilize the assets of the Transferor Company is also baseless and without any substance. In this behalf I rely upon the judgment of Delhi High Court in the case of In Re. HCL Infosystems Limited, HCL Infinet Limited and HCL Technologies Limited (2004) Comp. Case 861 (Del), wherein the scheme of arrangement was challenged on the ground that the company is siphoning away the profitable business. The objector referred to a TV interview in this regard. It was held in

para 31 that, “... Since in the present case the overwhelming majority of the shareholders has approved the scheme, the same cannot override the opinion of the intervener. The allegation of the objector that there is an effort to siphoning of the profitable business of the company in which case the minority shareholders would be deprived of the benefit is also considered by me giving due weightage thereto. No basis is provided in support of the aforesaid allegation. Therefore, the aforesaid contention is also without any merit”.

37.2 If one examines the amalgamation scheme then it reveals that all the desired disclosures have been made in the Scheme. The rationale benefits of the Scheme have been dealt with in the Scheme itself. The Petitioner Company has already presented the Scheme with requisite details. It also shows

that the scheme is beneficial not only to the Transferor Company and Transferee Company but also to the community at large. Once two companies get amalgamated, naturally the cost of the item will be less and company will be able to save certain administrative expenses. This is in the public interest.

37.3 As far as Official Liquidator is concerned, he had appointed one M/s.Malay J. Dalal, Chartered Accountants for carrying out the investigation work, and in their report, the Chartered Accountants after scrutiny of the Books of Accounts and affairs of the transferor company have submitted investigation report dated 4.6.2007. The said report contains brief history and activities of IPCL, objects of IPCL, activities of the company, management. The report ends with this observation that, as per the record made available to them i.e. Chartered Accountants,

and as per the information and explanations provided to them (Chartered Accountants), there is no material litigation either against the Directors of IPCL or against the Company and there is no prosecution against them either under the Companies Act or any other law for the time being in force in connection with the business and operation of the company.

37.4 The report also speaks about the accounts and financial position of the company, and under the said head, the Chartered Accountants have also stated about the Fixed Assets, Leased Assets, Depreciation, Impairment of Assets, Foreign Currency Transactions, Investments, Inventories, Turnover, Excise Duty, Employees Retirement Benefits, Borrowing Costs, Financial Derivatives, Provision for Current and Deferred Tax, Notes on Accounts. Even Internal

Audit, Tax Audit, Income-Tax, Sales Tax, Excise Duty, Profession Tax, Provident Fund / Superannuation /Gratuity/ESIC, Contingent Liability, Summarised Financial Position, Summarised Profit and Loss Account, Summarised Balance Sheet, Maintenance of Books of Accounts and Statutory Records, Maintenance of Cost Records and Credit Facilities. The Chartered Accountants have also shown the details of Transferee Company. The Chartered Accountants have also taken into consideration the advantages of amalgamation, salient features of the Scheme of amalgamation, Inter-se Transactions, Legal Proceedings, Conduct of Business, Employees, Saving of concluded transactions, Issue of Equity Shares, Issue of New GDRs, Fractional GDRs, General Provisions, Exemption from Registration, Accounting Treatment, Declaration of dividends, validity of existing Resolutions, Modifications in the Scheme,

Scheme conditional upon sanction, costs and in conclusion it has been stated that on the basis of their comments in above paras and according to the explanations given to them and the books of accounts produced before them, the acts and transactions of IPCL were conducted within the objects mentioned in the Memorandum of Association of Company and its affairs of the Company have not been conducted in a manner prejudicial to the interest of its members or the public interest.

37.5 The objectors have not been able to show any material whatsoever as to how the scheme is against the public interest and public policy. When the policy question of the Government particularly disinvestment policy or policy of the Companies Act regarding amalgamation is concerned, the Court jurisdiction is extremely limited. In this behalf this Court relies upon the judgment of

Hon'ble Apex Court in the case of Balco Employees Union (Regd.) vs. Union of India, (2002) 108 Comp. Cases 193 (SC), page 236 where it has stated that: “Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. It is not for the Court to consider relative merits of different economic policies and consider whether a wiser or a better one can be evolved. For testing the correctness of a policy, the appropriate forum is Parliament and not the Courts. In the matter of policy decision of economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be reluctant to impugn the judgments of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself.

The existence of rights of protection under Articles 14 and 16 of the Constitution cannot possibly have the effect of vetoing the Government's right to disinvest. Nor can the employees claim a right of continuous consultation at different stages of the disinvestment process. If the disinvestment process is gone through without contravening any law, then the normal consequences as a result of disinvestment must follow." (Emphasis added)

37.6 It may be noted that Section 394-A provides notice to be given to Central Government for applications under Secs.391 and 394. Section 394-A makes it obligatory on the Court to give notice to the Central Government of every application made to it under Section 391 or 394 and to take into consideration the representations made by that Government before passing any order on the proposed compromise

or arrangement or scheme of amalgamation. This would enable the Government to study the proposal and raise such objections thereto as it thinks fit in the light of the facts and information available with it, and also place the Court in possession of certain facts which might not have been disclosed by those who appear before it so that the interests of the investing public at large may be fully taken into account by the Court before passing its order. In this matter this Court has issued notice and the Regional Director has filed affidavit that he has no objection in this behalf and therefore in my view this also covers the aspect of public interest and public policy.

WHAT IS PUBLIC INTEREST – RIGHTS OF WORKERS:

37.7 Now this Court considers various judgements of the Hon'ble Supreme Court and

other Courts where what is meant by public interest has been considered.

37.7(1) **FERTILIZER CORPORATION KAMAGAR UNION (REGD.) SINDRI & OTHERS VS. UNION OF INDIA & OTHERS** reported in AIR 1981 SC 344 particularly para 47 on page 356 where the Hon'ble Supreme Court has observed as under:

> “In the present case a worker, who clearly, has an interest in the industry brings this action regarding an alleged wrong doing by the Board of Management. Article 43A of the Constitution confers, in principle, partnership status to workers in industry and we cannot, therefore, be deterred by technical considerations of corporate personality to keep out those who seek to remedy wrongs committed in the management of public

sector.”

37.7(2) **NATIONAL TEXTILE WORKERS' UNION VS. RAMKRISHNAN reported in AIR 1983 SC 75:** where the Hon'ble Apex Court has observed as under:

> “para 4. ... The socio-economic objectives set out in Part IV of the Constitution have since guided and shaped this new corporate philosophy.”
>
> “para 5. A company, according to the new socio-economic thinking, is a social institution having duties and responsibilities towards the community in which it functions.”
>
> “para 6. We are concerned in these appeals only with the relationship of the workers vis-a-vis the company. It

is clear from what we have stated above that it is not only the shareholders who have supplied capital who are interested in the enterprise which is being run by a company but the workers who supply labour are also equally, if not, more interested because what is produced by the enterprise is the result of labour as well as capital."

"... Then follows Article 43-A which is intended to herald industrial democracy and in the words of Krishna Iyer, J. mark "the end of industrial bonded labour". That Article says that the State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry."

37.7(3) **HINDUSTAN LEVER EMPLOYEES' UNION VS. HINDUSTAN LEVER LTD. AND OTHERS** reported in 83 Company Cases 30 where at page 39 the Hon'ble Supreme Court has observed as under:

> “What requires, however thoughtful consideration, is whether the company court has applied its mind to the public interest involved in the merger. In this regard the Indian law is a departure from the English law and it enjoins a duty on the court to examine objectively and carefully if the merger was not violative of public interest. No such provision exists in the English law. What would be public interest cannot be put in strait-jacket. It is a dynamic concept which keeps on changing. It has been explained in Black's Law Dictionary, as “something in which the public, the

community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. It does not mean anything so narrow as mere curiosity, whereas the interest of the particular locality which may be affected by the letters in question. Interest shared by citizens generally in affairs of local, State or national Government". It is an expression of wide amplitude. It may have different connotation and understanding when used in service law and yet a different meaning in criminal law or civil law and its share may be entirely different in company law. Its perspective may change when merger is of two Indian companies. But when it is with a subsidiary of a foreign company the consideration may be entirely

different. It is not the interest of the shareholders or the employees only but the interest of the society which may have to be examined. And a scheme valid and good may yet be bad if it is against public interest.

Section 394 casts an obligation on the court to be satisfied that the scheme for amalgamation or merger was not contrary to public interest. The basic principle of such satisfaction is none other than the broad and general principles inherent in any compromise or settlement entered into between parties that it should not be unfair or contrary to public policy or unconscionable. In amalgamation of companies, the courts have evolved, the principle of “prudent business management test” or that the scheme

should not be a device to evade law. But when the Court is concerned with a scheme of merger with a subsidiary of a foreign company then the test is not only whether the scheme shall result in maximising the profits of the shareholders or whether the interest of employees was protected but it has to ensure that the merger shall not result in impeding promotion of industry or obstruct the growth of national economy. Liberalised economic policy is to achieve this goal. The merger, therefore, should not be contrary to this objective. Reliance on the English decision for Hoare, In re (1933) All ER 105 (Ch D) and Bugle Press Ltd., In re (1961) Ch 270 that the power of the Court is to be satisfied only whether the provisions of the Act have been complied with or

that the class or classes were fully represented and the arrangement was such as a man of business would reasonably approve between two private companies may be correct and may normally be adhered to but when the merger is with a subsidiary of a foreign company then economic interest of the country may have to be given precedence. The jurisdiction of the court in this regard is comprehensive."

37.7(4) WOOD POLYMER LIMITED, In Re. AND BENGAL HOTELS PVT. LTD., In Re. Reported in 47 Company Cases 597 relevant page 615 where it is observed as follows:

"The question that should be fairly posed is : whether it is shown that the affairs of the company have not been

carried on in a manner prejudicial to the public interest? What then is the concept of “public interest” in company law. In the heydays of laissez faire, it was quite well-known for the leaders of trade and industry not only to ignore but disavow public interest involved in carrying on business. Their sole attention was confined to the interest of creditors and members. But other important consumers of industry-cum-commercial service were wholly ignored, namely, employees and consumers of the goods produced by the industry, I mean, the society.”

37.7(5) **PANCHMAHALS STEEL LTD. VS. UNIVERSAL STEEL TRADERS reported** in 46 Company Cases 706 (Coram: D.A. Desai, J (as he was then)) particularly at pages 718-719 it is observed thus:

"Law must take note of the existing situation in which problems that arise in law and have a human content have to be disposed of. Law cannot divorce itself off the mores of the day. Philosophy of law is functional and not analytical. Now, if law takes note of the existing situation in which a problem has been put in the lap of the Court, a solution must be sought through the machinery of law. Law cannot be static and its interpretation has to be dynamic. Law cannot operate in vacuum. Either by its pragmatic approach or progressive interpretation, law must find and offer a solution or it must perish. Socio-economic problems of

the contemporary times cannot be solved by the arid nineteenth century approach to the provisions of company laws. Time-honoured approach that the company law must safeguard the interest of investors and shareholders of the company would be too rigid a framework in which it can now operate. New problems call for a fresh approach. And in ascertaining and devising this fresh approach, the objective for which the company is formed may provide a guideline for the direction to be taken. As Prof. De Wool of Belgium puts it, the company has a three-fold reality – economic, human and public each with its own internal logic. The reality of the company is much

broader than that of an association of capital; it is a human working community that performs a collective action for the common good. In recent years a debate is going on in the world at large on the functions and foundations of corporate enterprise. The `preservationists' and the `reformers' are vigorously propounding their views on the possible reform of company, the modern trend emphasising the public interest in corporate enterprise.

And what is the modern trend? Prof. Gower in his “The Principles of Modern Company Law”, third edition, at page 634, had dealt with this problem in its true

perspective and it is worth quoting:

`One section of the community whose interests as such are not afforded any protection, either under this head or by virtue of the provisions for investor or creditor protection, are the workers and employees of the taken-over company. This is a particularly unfortunate facet of the principle that the interest of the company means only the interest of the members and not of those whose livelihood is in practice much more closely involved.'

In the same book in Chapter “The Future of Company Law in a Mixed Economy”, the same author has pointedly drawn attention to

the reversal of priority as a future modification of the company law and it bears the quotation (page 62).

`The vexed question of the relationship between the employees and the company which employs them is, in fact, a dominant theme in the current debate which flows over from company to labour law. It is generally accepted that it is unreal for the company law to ignore, as at present our law largely does, that the workers are as much, if not more, a part of the company as members of it”

37.7(6) **In re HATHISING MANUFACTURING COMPANY LTD. (IN LIQUIDATION)** reported in 46 Company Cases 59 particularly at pages 79-80

where this Court has observed thus:

> “The third criteria is whether the scheme of compromise and arrangement is such as a man of business would reasonably approve. The position can be examined in the wider context and not in the narrower context of the interest adversely affected by the scheme. Today, in our country, the corporate sector of economy has to play vital role both for phased expansion of the economic growth rate which can only be brought about by production and higher production, and the corresponding obligation to provide job avenues is of equal importance. It is the upward trend in growth resulting in higher economic growth rate which will provide expanded job avenues. And these are

the twin objects visualised in the world of economic planning. One cannot push up the living standard of those living below starvation line, unless some job is offered to them. Expansion of job avenues is the need of the day and this can keep pace with the economic growth rate, provided production is pushed up."

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but an honest businessman with genuine commercial judgement can feel very happy as to how by judicial process and legal contrivance a dead unit of production can be revived, revitalised and resurructed. That is our attempt and if one can avoid scrapping machine by profit-oriented businessman, the scheme must go through. I would, therefore, say that this is a scheme of compromise and arrangement which

must appeal to a businessman of the type herein discussed and that should be the approach of the Court."

37.7(7) **GUJARAT KAMDAR SAHAKARI MANDAL AND OTHERS VS. RAMKRISHNA MILLS LTD. (**92 Company Cases 92) at page Nos. 710-711 where this Court has observed as under:

"(viii) .....The way and the manner in which the industry is to be run is yet to be discussed and deliberated upon and at this stage the scheme cannot be turned down by this Court on the ground that the applicant is lacking experience to run the textile mill. Even otherwise, the workers' scheme for running the sick unit or worker' co-operative coming forward with a

scheme to restart the sick unit is a step towards fulfilment of one of the Directive Principles of State Policy which came to be introduced by the 42nd Amendment in the Constitution. Article 43A provides that the State shall take steps by suitable legislation or in any way to secure the participation of workers in the management of undertakings, establishments or other organisations engaged in any industry. This constitutional mandate has found executive asset as it is reported that the Minister of State for Labour has on behalf of the Government of India informed the Rajya Sabha that it was willing to hand over the sick industrial units to employees' co-operatives for their revival and that it would

provide all possible encouragements. It is also reported that the Finance Ministry had even indicated that it could consider writing off liabilities of the sick units if they were taken over by the employees' co-operatives. Even the Board for Industrial and Financial Reconstruction has sanctioned four schemes for revival of sick industries through workers' co-operatives, one of terms and conditions of the proposed scheme inter alia stipulates that secured creditors (financial institutions) shall waive their dues as per the policy of the Government of India."

37.7(8) LARSEN AND TOUBRO LIMITED reported in 121 Com. Cases 523 (Bom.) where at page 571 it is observed as under:

"The public interest, in sanctioning of the scheme of any kind, cannot be decided merely on the basis of general allegations of fraud, illegality or breach of public policy or public interest. There is no material placed on the record to justify the allegations of breach of public policy or public interest or that the scheme is unfair and contrary to the laws. After perusal of the scheme and after hearing all counsel for the respective companies and after considering the objections filed on record, there is nothing to show that the present scheme is against public interest or public policy. The corporate purpose and object of the scheme of arrangement as a whole is fair, just and reasonable on all material

aspects.”

MEANING OF PUBLIC INTEREST:

37.8 The expression is `an elusive abstraction' meaning general social welfare or `regard for social good' and predicating `interest of the general public in matters where regard for the social good is of the first moment'. {See. Public Administration and the Public Interest by E.Pendleton Herring}.

37.9 A thing is said to be in the public interest where it is or can be made to appear to be contributive to the general welfare rather than to the special privileges of a class, group or individual. DICTIONARY OF SOCIOLOGY, para 161.

37.10 It is essentially a majoritarian ethic

measured rather in terms of results or consequences than of interest or motive. Any decision as to public interest should be based on the results or consequences that will follow.

37.11 In common parlance it is taken to mean the interest of the community or nation as a whole as also the State or Government which represents it.

{Re: Companies Act by A. Ramaiya, Sixteenth Edition 2004 particularly page 3363 and 3364}.

37.12 The learned counsel has relied on page 37 of Hindustan Lever Employees Union's case (supra) regarding jurisdiction of the Court, fairness of the scheme which is already referred to earlier and page 39 regarding public interest which is also referred to earlier.

37.13 All the above cases show the importance of public interest. It is no doubt true that in the Scheme of amalgamation the Court has to see public interest. However, the objectors have not been able to show as to how the scheme of amalgamation is against the public interest or public policy.

RE. MONOPOLY:

38. It is no doubt true that the IPCL was originally a public limited company run by Central Government, but from 2002 when disinvestment policy came about 26% shares of IPCL were purchased by Reliance Industries Limited. The said fact has already been divulged by the Transferor Company. The US Guidelines of Department of Justice, as relied upon by the learned advocates for the objectors are not relevant in the present

amalgamation proceedings. There is no statutory requirement restricting amalgamation of associate company with the parent company under anti-trust laws in India. In this behalf both Regional Director and the Official Liquidator being statutory authorities, after examining this Scheme and all relevant correspondence and documents called for by them from the Petitioner Company, were fully satisfied with the Scheme and certified to the Court that the Scheme was not against the public policy and that the affairs of the Petitioner Company have not been conducted in a manner prejudicial to interest of the members or to public interest.

38.1 In addition, both Bombay Stock Exchange Limited and National Stock Exchange of India Limited have approved the Scheme under Clause 24(f) of the Listing Agreement. In this behalf I rely upon the judgment of

Hon'ble Apex Court in the case of Hindustan Lever Limited, (1995) 83 Company Cases 30, page 65, para F to G as well as judgment of this Court in Reliance Petroleum Limited vs. Union of India (2002) (O) GLHEL 210579, para 17, “One more objection is to the effect that the Court should refuse to grant its approval to the Scheme on the ground of public interest as the amalgamation will result in creation of monopoly in relation to production and marketing of goods. Nothing has been shown under any Act, Rule or Regulation or any other law under which the Company Court cannot exercise jurisdiction to sanction a Scheme in the event of a possibility or likelihood of monopoly resulting on the Scheme being sanctioned. The Apex Court has stated time and again that it is for the shareholders to decide what is in the best interest of the Company and if the shareholders have arrived at such a decision by applying approach of a

prudent businessmen, it is not for Court to sit in judgment. Furthermore, nothing has been brought on record to show that even if a monopoly results, it would affect the public interest or the economic interest of the country adversely, which may be a factor having relevant bearing." (Emphasis added)

38.2 In this behalf, This Court states that the Monopolies and Restrictive Trade Practices Act which was originally aimed to prevent monopoly has been repealed by the Parliament. Therefore, Therefore, the Parliament has enacted the Competition Act, 2002 which provides for keeping in view the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom

of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

38.3 When the Competition Act was enacted, one of the statements of objects and reasons of the Competition Act, was as follows:

> "In the pursuit of globalisation, India has responded by opening up its economy, removing controls and resorting to liberalisation. The natural corollary of this is that the Indian market should be geared to face competition from within the country and outside. The Monopolies and Restrictive Trade Practices Act, 1969 has become obsolete in certain respects in the light of international economic developments relating more particularly to competition laws and there is a need to shift our focus from curbing monopolies to

promoting competition.”

38.4 In view of the above situation when the entire Monopolies and Restrictive Trade Practices Act is repealed and new Competitive Act is enacted and in view of the objects and reasons of the Competitive Act, the entire question of of monopoly has no relevance. If one takes judicial notice of the fact that even the Government has also merged Air India with Indian Airlines to achieve the economy scale.

OBSERVATIONS RE.: DOCTRINE OF LIFTING OF VEIL OF CORPORATE PERSONALITY.

39.1 The doctrine of 'lifting the veil of corporate personality' is the one that is concerned with looking behind that juristic person called the 'corporation'.

39.2 Broadly speaking, the corporate veil may be lifted where the statute itself contemplates lifting veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded.

39.3 So if there is any ulterior motive for amalgamation then one can lift the veil. Here there is no whisper about the same and there is no question of lifting the veil. This contention is not well founded.

HIDDEN ASPECT:

40. As regards hidden aspect, both the companies have shown their balance sheets, public notice has been issued. Official liquidator has also filed report. The Regional Director has also filed report. Considering all these aspects, in my view the contention

of hidden objects which is being contended is not right.

OBSERVATION REGARDING SHARE EXCHANGE RATIO AND VALUATION REPORT:

41.1 This Court has considered the rival submissions in the above connection. The first contention that the objectors were not given share exchange ratio is not tenable because in fact the Official Liquidator has filed his report and along with affidavit of Official Liquidator, the report of auditors who are appointed by IPCL namely Pricewaterhouse Coopers Private Limited and Ernst & Young Private Limited dated 9.3.2007 has been produced. The same shows the share exchange ratio.

41.2 It may be noted that the above share exchange ratio report is only for the

guidance and assistance of the Board of Directors of companies to propose a share exchange ratio. The share exchange ratio has been calculated by the two eminent Chartered Accountants firms. The report shows about the procedure adopted by them. They have relied upon the data explanation. They have considered the financial position of the transferor company and transferee company. Along with the report there is further schedule which shows the factors determining share exchange ratio of equity shareholders where they have considered the financial position of both transferor company and transferee company. They have also stated the methodology, net assets value, earnings value and market value of the shares. These methods are well-known methods in share exchange ratio report. Once that is so, the jurisdiction of the Court is very Limited.

41.3 From the facts it has been clear that valuation report was kept open for inspection for all shareholders before the meeting. Notice convening the meeting of shareholders clearly stated that the report of the valuers regarding share exchange ratio was available for inspection at least for 21 days before the date of the meeting. In spite of this, none of the Objectors availed of the opportunity to inspect the same or objected for such inspection, asking for a copy of the report.

41.4 In view of the same, the objectors' present contention that they had no opportunity to see the valuation report is clearly an after-thought and without any basis. Once the report of the valuation is annexed with the Official Liquidator Report, the same is part of record in this behalf.

41.5 The reliance placed by the

applicant in Sultania's case is not relevant in this behalf as that case was pertaining to SEBI Takeover Regulations, which specifies principles of valuation to be stated in case the shares are infrequently traded. Such specifications are not at all relevant in the present scheme of amalgamation under Sections 391-394 of the Act. Since it is not the case of the objectors that the shares of the transferor company are infrequently traded.

41.6 In this behalf this Court relies upon the judgment of Hindustan Lever's case reported in (1995) 83 Comp. Cases 30, at page 37, para B and C, “... the jurisdiction of the court in sanctioning a claim of merger is not to ascertain with mathematical accuracy if the determination satisfied the arithmetical test. A Company Court does not exercise an appellate jurisdiction. It exercises a jurisdiction

founded on fairness. It is not required to interfere only because the figures arrived at by the valuer was not as good as it would have been if another method had been adopted. What is imperative is that such determination should not have been contrary to law and that it was not unfair for the shareholders of the company which was being merged. The Court's obligation is to be satisfied that valuation was in accordance with law and it was carried out by an independent body".(Emphasis added)

41.7 This Court also refers to page 57 of the above judgement, wherein the Hon'ble Supreme Court has approved the Division Bench judgment of this Court in the case of Jitendra R.Sukhadia vs. Alembic Chemical Works Ltd., (1987) 3 Comp LJ 141 : (1988) 64 Comp Cases 206, where the Court has observed that how exchange ratio was worked out, however, was not required to be stated in the statement

contemplated under Section 391(a) of the Companies Act.” (Emphasis added). The contention of the applicant that valuation report in the present case is not as per the specifications is without any substance and devoid of any merits. Section 391 does not require detailed workings to be shown to shareholders.

41.8 It may be noted that in this case the equity shareholders of the petitioner company have approved the scheme incorporating the share exchange ratio by an overwhelming majority. Once that is so, the Court jurisdiction is very limited. This Court relies on the Hon'ble Supreme Court judgment in Miheer H.Mafatlal vs. Mafatlal Industries Ltd. (supra), particularly para 40 which reads as under:

“It has also to be kept in view that

which exchange ratio is better is in the realm of commercial decision of well informed equity shareholders. It is not for the Court to sit in appeal over this value judgment of equity shareholders who are supposed to be men of world and reasonable persons who know their own benefit and interest underlying any proposed scheme. With open eyes they have okayed this ratio and the entire scheme."

41.9 This Court further refers to the judgment of this Court in the case of Reliance Petroleum Ltd., 2002(O) GLHEL 210579 (Company Petition No. 75 of 2002 decided on 13.9.2002 (per D.A. Mehta, J), wherein this Court dealt with identical issues and in para 27 this Court has held as under:

"para 27. Thus, by an overwhelming majority, those present have voted in favour of the resolution i.e. in favour of approving the Scheme as per share exchange ratio proposed on the basis of the valuation report dated 3.3.2002. In these circumstances, it is not open to the Court to hold that there was any impropriety in the valuation of the shares. In fact, the valuation report has stated that it has based its conclusion of value on the figures of assets and liabilities of both RPL and RIL reflected in the Balance Sheet as on 31.3.2001 along with the audited financial statement for the year ended on 31.3.1999 and 31.3.2000. The valuation report has also taken into consideration extracts of unaudited financial statements for the 9 months period ended on

31.12.2001. This is over and above the discussions with the management of both RPL and RIL, other informations, explanations and representations as were required and provided by the respective managements along with such other analysis, reviews and inquiries as were found necessary. The valuation report further states that the valuers have not made any independent investigation and assume no responsibilities for the various informations, details, explanations and representations placed before the valuers. It was vehemently urged during the course of hearing that this sort of disclaimer would virtually amount to the valuers denying any responsibility as regards the validity or genuineness of the share exchange ratio. It is necessary to note that

the figure of exchange ratio arrived at by the valuers could not be shown to be vitiated by fraud and/or mala fide. It is settled legal position that merely because the determination is done by a slightly different method which might result in a different conclusion would not justify interference unless it was found to be unfair. There is nothing on record to hold that the exchange ratio, brought on record by the aforesaid valuation report, is in any manner unjust or unfair. At the cost of repetition, it requires to be stated that it is the commercial wisdom of the parties to the Scheme who have taken an informed decision about the usefulness and propriety of the Scheme by supporting it by the requisite majority vote that has to to be kept

in view by the Court. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the Scheme by the requisite majority".

41.10 The learned sr. Counsel for the objectors has relied upon the judgment of Miheer Mafatlal's case (supra) but the same is not relevant in this behalf. In fact the Hon'ble Supreme Court has not pointed out that the details of the working for arriving at the share exchange ratio have to be covered in the valuation report, and therefore the contention of the Objectors that the valuation report is contrary to Section 391(2) of the Companies Act is without any merit and baseless.

41.11 As regards valuation not as per HLL/TOMCO Case, it is no doubt true that the Hon'ble Supreme Court has referred to the principle specified by `Weinberg and Blank' in the book `Takeovers and Mergers', but that was only recommendatory or illustrative in nature. It is not that if the same is not followed, the report of share exchange ratio becomes bad. In the present case the valuers have taken into account the relevant factors and methods as set out in the valuation report to arrive at the share exchange ratio and as such the same is very relevant, legal and valid.

41.12 The contention that valuation report is not as per FEMA regulations/CCI Guidelines is also not well-founded. The Objectors have failed to show as to which FEMA regulations are applicable for arriving at share exchange ratio in relation to amalgamation under Sections 391-394 of the Act. Further, CCI

(Controller of Capital Issues) guidelines have already been repealed way back in the year 1992 and therefore there is no question of referring the said guidelines in this behalf.

41.13 In view of these facts and circumstances of the case, there is no basis for the objection regarding share exchange ratio and valuation report and the said contention cannot be accepted in this behalf.

41.14 In the above case, the share exchange ratio, which was worked out by a recognized firm of Chartered Accountants, was accepted by the shareholders and no mistake was pointed out in the process of valuation. The Court refused to interfere in this aspect of the scheme. This Court also relies upn the case of NAVJIVAN MILLS LTD. Re: (1972) 42 Com. Cases 265 at p. 320 (Guj).

41.15 As regards share exchange ratio, it was submitted that though the appointed date in the Scheme is 1st April, 2006, for the purpose of valuation, the auditor has not considered the said date. The Company has submitted that the appointed date in the scheme is 1st April, 2006. For the purpose of valuation, the valuers have analyzed and considered the audited financial statements of RIL and IPCL for the three years ending on 31st March, 2006. It is, therefore, that the appointed date in the scheme is fixed as 1st April, 2006.

OBSERVATION REGARDING DEBENTURE HOLDERS ARE SEPARATE CLASS FROM THE SECURED CREDITORS.

42.1 This Court has considered the objections filed by Mr. Shalin Mehta, learned advocate in this behalf.

42.2 The contention of the applicant that Debenture Holders are separate class and distinct from Secured Creditors of IPCL on the basis of the provisions of Section 117A of the Companies Act which provides for Debenture Trust Deed; Section 117B which provides for appointment of Debenture Trustee and duties of Debenture Trustees and Section 117C which provides for liability of Company to create Security and debenture redemption reserves. The issue is that debenture holders are to some extent separately treated by Company Law from the secured creditors. It is also no doubt that Articles of Association also treat debenture holders differently from secured creditors. Even the balance sheet of IPCL also treats debenture holders separately from secured creditors. Therefore, there is considerable force in the submission of Mr. Mehta, learned advocate in this behalf.

42.3 However, the debenture holders are also a part of the secured creditors. The contention of the applicant that debenture holders of IPCL and secured creditors of IPCL have dissimilar charges over the Company's assets is not borne out from the record of the case. The concept of `preferential creditors' is not relevant in the context of amalgamation. Section 530 of the Companies Act lists out different categories of preferential creditors such as Government revenues, wages of workmen, provident fund, pension fund, gratuity fund and so on. Debenture holders are not one among them. Like any other secured creditors, debenture holders are entitled to lay their hands on the assets secured in their favour for recovery of their dues. They are placed on the same footing as other secured creditors. The sub-classes of creditors may be relevant only if different treatment is given/

offered in the scheme. If the same treatment is given to all secured creditors including debenture holders in the scheme, then there is no requirement of classifying the debenture holders as a separate class. In this behalf I refer to the Division Bench judgement of this Court in the case of Mafatlal Industries reported in (1996) 87 Comp. Cases 705 (Guj) (Coram: C.K. Thakkar (as he was then) & R. Balia, JJ). On page 733 of the said judgement, it has been observed as under:

> “In our opinion, a plain reading of the Section does not leave any doubt where separate terms are offered to separate classes of shareholders or creditors under the proposed compromise or arrangement, separate meetings are required to be held in respect of each class of creditors or shareholders for whom separate

compromise or arrangement has been offered. ..... Therefore, before adverting to the question whether the appellant-objector constitutes a separate class of shareholders or not, it has to be seen whether any different terms have been offered to different classes of creditors or members and whether any classification of members is required to be made in accordance with those distinctions in terms of the compromise offered to them and whether any such separate meeting was required to be called. The classification of members or creditors will be founded on the basis of the difference in the terms offered under the scheme. The difference in terms of the scheme can be the only criterion for identifying the separate class for the purpose of convening a separate

meeting for such class."

42.4 This Court relies upon the judgement of this Court in the case of Arvind Mills Ltd., reported in (2002) 111 Comp. Cases 118 (Guj). In the said judgement, in para 12 on page 31, it has been observed as under:

> "The classification of members or creditors can be founded on the basis of difference in the terms offered under the scheme. The difference in terms of the scheme can be the only criterion for identifying separate class for the purpose of convening a separate meeting for such class."

42.5 The objectors' contention that the classification should be based on `different rights' besides `differential treatment' is both legally untenable as also without any substance. It has been consistently held by

this Court that the classification of creditors should be based on the treatment which is being offered to them under the scheme of arrangement. Merely because debenture-holders have first charge does not make them a separate class distinct from other secured creditors.

42.6 This Court also relies on the decision in the case of SIEL LIMITED, In re reported in 122 Company Cases 536 where the Delhi High Court has observed on page 553 as under:

> “.... The scheme proposed may be regarded as a single arrangement with those creditors whom it is intended to bind, if only if the rights of those creditors are not so dissimilar as to make it impossible for them to consult together with a view to their

common interest. If the rights of those creditors whom the scheme is intended to bind are such as to make it impossible for them to consult together with a view to their common interest, then the scheme must be regarded as a number of linked arrangement. In the latter case it will be necessary to have a separate meeting of each class of creditors; a class being identified by the test that the rights of those creditors within it are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

42.7 On page 555 of the above judgement, the Court has further observed as under:

"..... Consequently, there was no necessity of having a separate

meeting so far the UTI is concerned as the UTI was also a secured lender like all other secured creditors and it did not constitute a separate class. In Arvind Mills Limited (supra) the Gujarat High Court has held that there cannot be a class within the class and the class has to be one type of creditors, namely, secured creditors, unsecured creditors and working capital lenders as all the secured creditors have similar rights in the company."

42.8 Reliance is placed on the decision of this Court in the case of KRIL STANDARD PRODUCTS PRIVATE LTD., In re reported in 46 Company Cases 203, the judgement delivered by D.A. Desai, J.

42.9 It is no doubt true that in balance

sheet, the secured creditors and debenture holders are separately shown. But it is clear that disclosures in balance sheet are as per the statutory requirements of Schedule VI to the Companies Act and the applicable accounting standards. But mere separate disclosures cannot make debenture holders a separate class of creditors. On the contrary, in a balance sheet of a company drawn up in the form given in Schedule VI, debenture holders are classified under “Secured Creditors”, which shows debenture holders are one part of the “Secured Creditors.”

42.10 This Court relies upon the judgement of the Hon'ble Supreme Curt in the case of National Rayon Corporation Ltd. vs. Commissioner of Income Tax reported in AIR 1997 SC 3487 page 3490 and the relevant portion is para 12 page on 3490.

42.11 As regards Articles of Association of the Transferor Company, they contain the standard provisions based on the provisions of the Companies Act read with relevant rules. There is no specific provision treating debenture holders as a class separate from the other secured creditors.

DEBENTURE HOLDERS: SEC.117A, 117B & 117C ARE CONSIDERED:

43.1. Sec.117A provides for Debenture trust deed; Sec.117B provides for appointment of debenture trustees and duties of debenture trustees, and Sec.117C provides for liability of company to create security and debenture redemption reserve. The issue of debentures is commonly secured by a trust deed by which the property forming the security is charged by way of mortgage to the trustees. The trust deed provides, the terms and conditions on

which the charge is held and may be enforced. Sub-section (1) provides for time limit for execution of trust deed; sub-section (2) provides for inspection of copies; and sub-section (3) provides for penalty for default.

43.2. Sec.117B relates to appointment of debenture trustees and their duties. Before issue of prospectus or a letter of offer for subscription of debentures, the Company has not only to appoint trustees but has also to state on the face of the said documents that the trustees have given their consent to act as such. The trustees are statutorily required to protect the interests of the debenture-holders and redress their grievances, in case the company defaults in the payment of interest or repayment of the principal amount on redemption, as per terms and conditions of issue of debentures. Sub-section (1) relates to appointment of

debenture trustee and proviso to sub-section (1) relates to disqualification for appointment as debenture trustees. Sub-section (2) to (4) provides for functions of debenture trustees.

43.3. Duties of debenture trustees under SEBI (Debenture Trustees) Regulations, 1993. Duty of debenture trustee to furnish information to SEBI. Duties and powers of debenture trustees under SEBI Guidelines, 2000. Power of Company Law Board to restrict creation of further liabilities [sub-section (4)].

43.4. Sec.117C provides for liability of company to create security and debenture redemption reserve. This section makes it obligatory for every company to issue only secured debentures. In other words, debentures which are not backed by security cannot be

issued. The security is required to be created for issue of debentures, whether through prospectus or by rights issue or by way of private placement. A charge is required to be created on the properties of the Company particulars of which have to be filed with the Registrar within 30 days of the creation of the charge vide provisions of Section 125 of the Act. It also provides for creation of Debenture Redemption Reserves (DBR) under SEBI Guidelines, 2000. It also provides for filing of particulars of charge with the Registrar, redemption of debentures [Sub-section (3)], default in redemption – petition before Company Law Board {Sub-section (4)]. If there is a violation in redeeming the debentures on the date of maturity, the Directors can be disqualified on failure to redeem debentures on maturity as per provisions of Section 274(g) of the Companies Act. All these show that the debenture holders are one kind of

secured creditors with different protection but nonetheless they are also one of the class of secured creditors and their right and interest are the same. The Company gives similar treatment to the debenture holders and secured creditors.

SECTION 391 – 394 – RE: AMALGAMATION: (SEPARATE MEETING OF DEBENTURE HOLDERS & SECURED CREDITORS)

43.5. Section 391 of the Act, particularly deals with the power to compromise or make arrangements with creditors and members where a compromise or arrangement is proposed – (a) between a company and its creditors or any class of them; or (b) between itself and its members or any class of them. It covers restructuring, merger, demerger and hiving off of a unit by a company. The consent of the company in general meeting under section

293(1) of the Act is also required for hiving off an undertaking of the company.

43.6. The creditors can be divided into three categories of preferential creditors, secured creditors and unsecured creditors. In the case of Miheer H.Mafatlal v. Mafatlal Industries Ltd. (1996) 87 Com.Cases 792 at 833 (SC), the Hon'ble Apex Court considered Sec.391 and observed that this clearly pre-supposes that if the scheme of arrangement or compromise is offered to the members as a class and no separate scheme is offered to any sub-class of members which has a separate interest and a separate scheme to consider, no question of holding a separate meeting of such a sub-class would at all survive. Consequently when one and the same scheme is offered to the entire class of equity shareholders for their consideration and when commercial interest of the appellant so far as the scheme is

concerned is in common with other equity shareholders, he would have a common cause with them either to accept or to reject the scheme from commercial point of view.

43.7 The Supreme Court in Mafatlal's case (supra) has referred to PALMER'S COMPANY LAW, 24th Edition; and also some English cases, and ultimately on page 34, the Hon'ble Apex Court observed that, it is therefore, obvious that unless a separate and different type of scheme of compromise is offered to a sub-class of a class of creditors or shareholders otherwise equally circumscribed by the class, no separate meeting of such sub-class of the main class of members or creditors is required to be convened.

43.8 As the company has offered similar compromise to both secured creditors and debenture holders and the secured creditors

have similar interest with that of debenture holders, both of them have common interest and thus the debenture holders and secured creditors can be treated as single. This is a question of fact and the Chairman of the Company has considered this aspect in this behalf.

43.9 As regards different treatment given to debenture holders from the secured creditors on the basis of the balance sheet of the IPCL, the Company submitted that under the Scheme, the treatment given to the secured creditors including debenture holders is identical. There is no change in the rights and interest of the secured creditors (including debenture holders), post amalgamation. The securities which are in favour of the secured creditors (including debenture holders) or the reserves for debenture holders is not going to be affected

any change post amalgamation. Thus, as per the well settled principle of law that a common meeting can be convened, for the class of creditors who are given same/similar treatment in the scheme of amalgamation; a common meeting was convened in the instant case, for the class comprising secured creditors and debenture holders. The said action is, therefore, neither irregular nor illegal.

43.10 'Classes of creditors': The Court has to classify creditors or members if there are such classes and before sanctioning the scheme, to see that their respective interests are taken care of. (Maneckchowk & Ahmedabad Mfg. Co. Ltd. Re: (1970) 40 Com. Cases 819 (Guj.). Re: BUCKLEY ON THE COMPANIES ACT, 13th Edition, page 406 (para 525.24)

OBSERVATION REGARDING DEBENDTURE HOLDERS AND SECURED CREDITORS:

44. The learned counsel has relied on several contentions and the Company has also tried to reply to the same. This Court has considered all the aspects. There are certain factors which this Court has set out. As regards meeting of Secured Creditors, initial aspects this Court has recorded. As regards Secured Creditors including debenture holders there were 51 persons present and all have voted in favour of the scheme. No debenture holder or secured creditor has voted against the scheme. Only three votes were declared invalid, value of which is 0.25 crores. In view of the fact that there were 51 secured creditors including debenture holders present, all of whom have voted in favour, this Court is of the view that the contention of the learned counsel for the applicants will not survive. Even if one takes into consideration the different value attached to the debenture

holders or the secured creditors, that will have no effect as far as approval of the scheme is concerned.

44.1 In view of the same, reliance placed by the learned counsel for the applicant-objector on the judgement of the National Rayon Corporation Ltd. as well as the judgement of the Madras High Court will have no relevance in this behalf.

PROXY:

45.1 Objection of objector regarding blank proxies is that they are signed by some of the employees-shareholders under pressure. This Court considered the contention of the applicant as well as the Company's reply. The aforesaid objections raised by the applicant/objector is not well founded and is

clearly an afterthought because earlier no single person has addressed any letter to the Chairman of the Court convening meeting or before the Company for withdrawal of the proxies.

45.2 In view of the averments made by the learned counsel for the Company, at the time of the meetings, the Chairman had assured that even if the employee-shares have given proxies earlier, but if they are personally present in the meeting, then they will be entitled to vote and the proxy would be held invalid while their votes would be considered. The Chairman had also instructed scrutineers accordingly. The Chairman's report also states in this behalf. In view of this report of the Chairman, in my view, the contention of the objector regarding blank proxy forms is not well founded and is liable to be rejected.

SCHEME OF SECTIONS 391 TO 394:

45.3 After considering all the objections, now this Court considers Sections 391 to 394A of the Companies Act which read as under:

45.4(1) "Section 391 of the Companies Act – Power to compromise or make arrangements with creditors and members -

"(1) Where a compromise or arrangement is proposed -

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or, in the case of a company which is being wound up, of the liquidator, order a

meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs.

(2) If a majority in number representing three-fourths in value of the creditors, or class of creditors, or members, or class of members, as the case may be, present and voting either in person or, where proxies are allowed (under the rules made under Section 643), by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court be binding on all the creditors, all the creditors of the class, all the members, or all the members of the

class, as the case may be, and also on the company, or in the case of a company which is being wound up, on the liquidator and contributories of the company:

(provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the

company under Sections 235 to 251 and the like).

45.4(2) **Power of Court to enforce compromise and arrangement**:

"Section 392(1) Where the Court makes an order under section 391 sanctioning compromise or an arrangement in respect of a company, if -

(a) shall have a power to supervise the carrying out of the compromise or an arrangement; and

(b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper working of

the compromise or arrangement.

(2) If the Court aforesaid is satisfied that a compromise or arrangement sanctioned under Section 391 cannot be worked satisfactorily with or without modifications, it may, either on its own motion or on the application of any person interested in the affairs of the company, make an order winding up the company, and such an order shall be deemed to be an order made under Section 433 of this Act."

45.4(3) Notice to be given to Central Government for application under Sections 391 and 394

"Sec. 394A – The Court shall give notice of every application made to

it under Section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these Sections."

45.4(4) Section 392 - Power of Court to enforce compromise and arrangement: This section provides for enforcement of the scheme of arrangement etc. sanctioned under Sec.391.

45.4(5) Section 393: Information as to compromises or arrangements with creditors and members.

45.4(6) Section 394: This section provides provisions for facilitating reconstruction and amalgamation of companies.

IMPORTANCE OF SECTIONS:

45.5 The word 'arrangement' means something analogous in some sense to a compromise. Sec.391 applies to 'compromise' or 'arrangements'.

45.6 The word 'arrangement' in this section is liable to be interpreted widely. When a proposed scheme affected the contractual relationship subsisting between the company and its members by requiring the company to register a third party applicant in place of existing members as the holder of the company;s shares, the scheme was an arrangement within the meaning of this section.

45.7 “Arrangement”, the word is of wide import and includes reorganisation of share capital by the consolidation of different

classes of shares or division of shares into shares of different classes or by both the methods.

MERGER/AMALGAMATION:

45.8 What is meant by "Merger" - Meaning of "merger" -

> "Merger means the fusion or absorption of one company by another, the latter retaining its own name and identity and acquiring assets, liabilities, franchises and powers of former, and the absorbed company ceasing to exist as a separate entity. It differs from a consolidation wherein all the corporations terminate their existence and become parties to a new one.
>
> [Halsbury's Laws of India Vol. 27, para 40.634 page No. 415)

45.8A What is meant by amalgamation -

"Amalgamation or reconstruction has no precise legal meaning. In amalgamation, two or more companies are fused into one by merger or by taking over by another. When two companies are merged and are so joined as to form a third company or one is absorbed into the other or blended with another, the amalgamating company loses its identity. Amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company becoming substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more

undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly, amalgamation does not, it seems, cover the mere acquisition by a company of the share capital of the other company which remains in existence and continues its undertakings, but the context in which the term is used may show that it is intended to include such an acquisition.” (Re: Halsbury's Laws of India, Vol.27, para 40.636 page No. 415)

45.9 The duties of the Court under these Sections are onerous and have to be carefully performed. Consideration of public interest has to be considered while exercising power under Sec.394 of the Act.

Hindustan Lever Employees Union v. Hindustan Lever Ltd. s(1995) 83 Com. Cases 30 [at pp.39, 40, 63, 64].

GENERAL OBSERVATIONS REGARDING THE SCHEME:

45.10 When considering sanction of a scheme, the Court has to consider the following aspects:

(1) The meeting was duly held and conducted;

(2) The compromise was a real compromise;

(3) It was accepted by a competent majority;

(4) That the majority was acting in good faith and for common advantage of the whole class;; and

(5) that what they did was reasonable, prudent and proper.

45.11 The Court has also to satisfy itself that:

45.11(1) Whether the provisions of the statute have been complied with;

45.11(2) Whether the scheme is reasonable and practical or whether there is any reasonable objection to it;

45.11(3) Whether the creditors acted honestly and in good faith and had sufficient information;

45.11(4) Whether the Court ought in the public interest to override the decision of the creditors and shareholders.

[Re: CHPL Enterprises P.Ltd. Re. (2000) 2 Comp. L.J. 218 (AP)].

45.12 In a scheme, which is fair and

reasonable and made in good faith, may be sanctioned if it could reasonably be supported by sensible people to be for the benefit to each class of the members or creditors concerned. If the Court is satisfied that the scheme is fair and reasonable and in the interests of the general body of shareholders, the Court will not make any provision in favour of the dissentients.

45.13 Where a scheme is found to be reasonable and fair, it is not a function of the Court to substitute its judgment for the collective wisdom of the shareholders of the companies involved.

45.14 Where the scheme of amalgamation which enjoyed an all-round approval including that of the official liquidator, creditors and employees, it was confirmed by the Court with effect that it became binding on all the

shareholders, creditors, secured and unsecured of both the Companies.

45.15 Where there is no allegation of mala fides or fraud against the valuation done for the share exchange ratio. The Company Court would not go into the controversy of the valuation as the shareholders of the transferee company had accepted the ratio arrived at by the auditors. The scheme had to to be presumed to be fair and just, as, except a fraction of the concerned shareholders, all had consciously voted for the scheme and had accepted it to be in their larger interests, it had to be sanctioned.

45.16 The effective date of scheme : A compromise or arrangement takes effect from the date when it is arrived at subject to the sanction of the court. If the court refuses sanction, it becomes without effect. If the

court grants sanction, it takes effect, not from the date of the sanction, but from the date when it was arrived at. Sanction of the Court to a compromise has relation back and a scheme or arrangement agreed to by the creditors of a company becomes operative from the date of the meeting in which it is agreed to and not from the date on which the Court's sanction is given.

45.17 This Court relies upon the decision of the Hon'ble Supreme Court in Hindustan Lever and another v. State of Maharashtra and another (2004) 9 SCC 438, para 11, “While exercising its power in sanctioning a scheme of agreement, the Court has to examine as to whether the provisions of the statute have been complied with. Once the Court finds that the parameters set out in Section 394 of the Companies Act have been met then the Court would have no further jurisdiction to sit in

appeal over the commercial wisdom of the class of persons who with their eyes open give their approval, even if, in the view of the Court a better scheme could have been framed".

45.18 This Court further relies on para 9 to 13 and 18 of the judgment reported in Hindustan Lever and Another Vs. State of Maharashtra and another (2004) 9 SCC 438. This Court also relies upon Miheer Mafatlal vs. Mafatlal Industries Ltd., (1997) 1 SCC 579 and also on the Torrent Powers – AEC Ltd., (2007) 138 Comp. Cases 139 (Guj).

GENERAL OBSERVATIONS:

46.1 On behalf of some of the employees shareholders it was contended that IPCL was originally Government of India undertaking. In 2002 in part disinvestment, the Reliance Petroleum took 26% shares of the Company and

took control over the IPCL. It was further submitted that now the IPCL as well as Reliance desires to amalgamate. The idea of Reliance is to take advantage of the assets of IPCL so that they may use its reserves and some of the assets of IPCL. The aforesaid contention is wholly erroneous in this context. Along with Company Petition No.93/07, they have annexed the Balance Sheet for the year 2005-2006 i.e. Year ended 31.3.2006. In the said Balance Sheet, on page 29, the financial highlights of 10 years at a glance have been shown. In that for the year ended 31.3.2002, the turn over was 5527 crores. The total income was 5691 crores and profit after tax was 107 crores. After Reliance Petroleum took 26% shares and handle the management for the year 2005-2006, the turn over comes to 12,362 crores, total income comes to Rs.12,629 crores and profit after tax comes to 1164 crores. This shows that the financial

management of IPCL is very well and the turn over comes almost more than double, but profit is increased 10 times. This shows that the policy has been carried out and put the IPCL in great profitable things.

46.2 One of the contentions on behalf of some of the employees shareholders stated that recent amalgamation of six sick units, viz., Apollo Fibers Limited, Central India Polyesters Limited, India Polyfibers Limited, Orissa Polyfibers Limited, Recron Synthetics Limited and Silvassa Industries Private Limited into IPCL in the year 2006 has resulted in a reduction of IPCL's profit at least on paper. This aspect ought to have been factored in by the experts while determining the share exchange ratio.

46.3 The aforesaid contention is also clearly an afterthoughts as this amalgamation

was in 2006 and the said order of amalgamation has not been challenged and therefore the shareholders of IPCL was already acquiesced in this behalf. There is great delay in challenging the said acquisition in the present proceedings. In fact, the present proceedings is not proper proceedings to challenge the said amalgamation in this behalf.

46.4 As indicated above, even the turn over, the total income and profit after tax has substantially increased from time to time. The turn over for the year 3.3.2005, it was 9386 crores rose to 12,362 crores. The turn over in 2005 was 9518 crores rose to 12,620 crores in 31.3.2006 and the profit it was 786 crores for the year 2005 rose to 1164 crores. So the aforesaid fact clearly shows that the aforesaid contention is not borne out from the record of the case.

46.5 The Transferor Company has annexed the balance-sheet of IPCL for the year ended on 31.3.2006. In one page Financial Highlight for 10 years at a glance have been shown. The said page is annexed to this judgement at **Annexure-A** which shows that since 10 years IPCL has made immense growth particularly after 2002 when disinvestment of the IPCL took place. The turnover has increased almost more than two and half times. Income is also increased almost two and half times. Earning before depreciation, interest and tax is also increased. Profit after tax is increased almost ten times. Equity dividend percentage is almost doubled. Dividend payout is also increased. Equity share capital reserves and surplus have also been increased. As regards key indicators, earning per share is also increased. Turnover per share, book value per share, net profit margin have also been

increased. This shows that the Company has worked very well. Therefore, the allegation of the objectors that RIL who has taken over after 2002 wants to take advantage of the assets of IPCL as well as its reserves is misplaced and baseless.

FINAL DIRECTION:

47.1 That the arrangement embodied in the Scheme of Amalgamation being Exhibit “G” to the petition is sanctioned by this Court as to be binding with effect from 1st April, 2006, the Appointed Date, on the Company and the Transferee Company and all their respective shareholders and creditors and all concerned persons;

47.2 That with effect from the Appointed Date and subject to Part III of the Scheme of Amalgamation, the whole of the undertaking of the Transferor Company including all the properties, rights and powers of the

Transferor Company as specified in Schedule I hereto and all other properties, rights and powers of the Transferor Company shall, pursuant to the provisions of Sections 391 to 394 and other applicable provisions, if any, of the Companies Act stand transferred to and vested in or be deemed to have been transferred to and vested in the Transferee Company, as a going concern without any further act, instrument, deed, matter or thing so as to become the undertaking of the Transferee Company by virtue of and in the manner provided in the Scheme of Amalgamation.

47.3 That with effect from the Appointed Date, all liabilities of every kind, nature and description of the Transferor Company shall, pursuant to the provisions of Sections 391 to 394 of the Companies Act and other applicable provisions, if any, of the Companies Act, be restructured in the manner

set out in Part III of the Scheme of Amalgamation.

47.4 That with effect from the Appointed Date, all liabilities of every kind, nature and description of the Transferor Company shall, pursuant to the provisions of Sections 391 to 394 of the Companies Act and other applicable provisions, if any, of the Companies Act, stand transferred or be deemed to be transferred to the Transferee Company, without any further act, instrument, deed, matter or thing and the same shall be assumed by the Transferee Company to the extent they are outstanding on the Effective Date so as to become as and from the Appointed Date the liabilities of the Transferee Company on the same terms and conditions as were applicable to the Transferor Company and the Transferee Company shall meet, discharge and satisfy the same and it shall not be necessary to obtain

the consent of any third party or other person who is a party to any contract or arrangement by virtue of which such liabilities have arisen in order to give effect to such transfer.

47.5 That the Transferee Company shall, without any further application, act, instrument or deed, issue and allot to the equity shareholders of the Transferor company, whose names are registered in the Register of Members of the Transferor Company on the Record Date (to be fixed by the Board of Directors of the Transferee Company or a Committee of such Board of Directors) or his/her/its heirs, executors or, as the case may be, successors, equity shares of Rs.10/- (Rupees Ten only) each, credited as fully paid up of the Transferee Company, in the ratio of 1 equity share of the face value of Rs.10/- (Rupees Ten only) of the Transferee Company

with rights attached hereto as mentioned in this Scheme for every 5 equity shares of the face value of Rs.10/- (Rupees Ten only) each credited as fully paid-up held by such equity shareholders or their respective heirs, executors or, as the case may be, successors in the Transferor Company.

47.6 That in consideration of the transfer and vesting of the undertaking of the Petitioner Company in the Transferee Company, pursuant to the provisions of this Scheme, the Transferee Company shall instruct its depository (the “Transferee Depository”) to issue GDRs of the Transferee Company to the existing eligible holders of GDRs of the Transferor Company in an appropriate manner in respect of the existing GDRs of the Transferor Company, in accordance with applicable law and the terms of the deposit agreement entered into amongst the Transferee Company, the Bank

of New York and all registered holders of and beneficial owners from time to time of the GDRs of the Transferee Company (the “Deposit Agreement”). The Transferor Company shall issue necessary instructions to its depository (the “Transferee Depository”) and the Transferee Company, the Transferee Depository, the Transferor Company and the Transferor Depository shall enter into such further documents as may be necessary and appropriate in this behalf, which shall contain all detailed terms and conditions of such issue.

47.7 That all the employees of the Petitioner Company who are in employment as on the Effective Date shall become the employees of the Transferee Company with effect from the Effective Date without any break or interruption in service and on the same terms and conditions as to employment and remuneration on which they are engaged or

employed by the Petitioner Company (subject to option which is provided in operative order).

47.8 That on and from the Effective Date, all suits, actions and legal proceedings by or against the Petitioner Company shall be continued and/or enforced by or against the Transferee Company as effectually and in the same manner and to the same extent as if the same and been instituted and/or pending and/or arising by or against the name of the Transferee Company (it also includes operative direction given regarding ancillary industries also).

47.9 That the Petitioner Company shall stand dissolved without winding-up as provided for in the Scheme of Amalgamation.

48. Here in this case IPCL has merged with Reliance Industries Limited. It is no doubt

true that both the Companies are big and once these two companies are merged, the amalgamated Company will be bigger and global Company. However, this Court is of the view that even if the Company becomes big in size but this has no relevance unless the Company improves its quality of service to its customers, workers, shareholders and ultimately for itself then the Company will become globally competitive. The Company is not known for its size but the quality of service. For that purpose this Court relies on the fundamental Code of Conduct which may apply to the new company.

FUNAMENTAL CODE OF CONDUCT

48.1 CONDUCT which is of the highest ethical standards-intellectual, financial and moral and reflects the highest levels of courtesy and consideration to others.

48.2 CONDUCT which builds and maintains Team work, with mutual trust as the basis of all working relationship.

48.3 CONDUCT which puts the customer first, the Company second and the self last.

48.4 CONDUCT which exemplifies care for the customer through anticipation of need, attention to detail, excellence, aesthetics and style and respect for privacy along with warmth and concern.

48.5 CONDUCT which demonstrates two-way communication accepting constructive debate and dissent whilst acting fearlessly with conviction.

48.6 CONDUCT which demonstrates that people are our key asset, through respect for every

employee, and leading from the front regarding performance achievements as well as individual development.

48.7 CONDUCT which at all times safeguards the safety, security, health and environment of customers, employees and the assets of the Company.

48.8 CONDUCT which eschews the short-term quick-fix for the long-term establishment of healthy precedent.

48.9 Once the transferee company tries to follow the said conduct, this Court hopes and trusts that the new company will consider that they are committed to meeting and exceedings the expectations of their customers through their unremitting dedication to perfection, in every aspect of service to their general public; the company will commit

to the growth, development and welfare of their people including the employees upon whom they rely to make this happen; and the company will have their distinctiveness together the company shall continue to have their tradition of pioneering in the manufacturing industry, striving for unsurpassed excellence in high potential areas all throughout India and the world and as a result of that they will create extraordinary value for their stakeholders.

[Quoted from the recent Annual Report 2006-2007 of EIH LIMITED, a member of The Oberoi Group pages 6 & 7 with slight modifications]

48.10 Before part with this judgement, this Court is extremely grateful to the learned sr. counsel, Shri K.S. Nanavati, Shri Mihir Thakore and Shri S.N. Soparkar who have

appeared with Mr. Nandish Chudgar, learned advocate for the petitioner Company and Shri Girish Patel, learned sr. counsel who has appeared with Mr. Shalin Mehta, Mr. P.R. Thakkar and Mr. Ramnandan Singh, learned advocates for workers/objectors for rendering their valuable assistance in connection with this matter.

49. FINAL DIRECTIONS/OPERATIVE ORDER WHICH WAS PRONOUNCED BY THIS COURT ON 16.8.2007.

1. As regards ancillary industries, it is directed by way of clarification that the Civil Suits filed by the ancillary industries against the transferor Company both at Vadodara Court in Gujarat and Raighad Court in Maharashtra shall be continued against the transferee Company after amalgamation order. The final decree (i.e. subject to challenge by the either party) that may be passed by the concerned Courts shall be binding on the

transferee Company.

2. So far as Scheduled Castes/Scheduled Tribes employees are concerned, it is directed by way of clarification that while considering the objections filed by SC/ST employees dated 5.6.2007 before the Ministry of Chemicals and Petrochemicals, the said authority will pass order after hearing the said employees and also the transferee Company. The authority will pass a reasoned order. Such order will be subject to challenge by the either party before appropriate forum in appropriate proceedings and the finally adjudicated order will be binding on the transferee Company.

3. **So far as the objections raised by employees of four Trade Unions are concerned,** in view of the statement made by the learned senior counsel for the transferor Company agreeing of the following directions it is

directed that:

(a) The (Transferor)/Transferee Company will give an option to the present employees of the Transferor Company either to join (or work with) the Transferee Company or not to join [by putting a notice on Notice Board] so that there will not be any coercion or compulsion to the concerned employees. Such option shall be executed within a period of two months from the date of the order of this Court.

(b) It is also directed that the employees of the Transferor Company who join the Transferee Company shall be governed by the Scheme with modification that such employees shall be continued to be paid the

same salary and other perquisites as well as other benefits as they are being paid and given by the Transferor Company before amalgamation. It is also directed that the payment and other benefits including the salary as well as Provident Funds that are to be paid and given to such employees shall be paid and given to them at Vadodara as at present it is paid.

4. **As far as objection regarding monopoly is concerned,** in view of the discussion, which this Court has there is no substance in the objection and the same is rejected.

5. **So far as lifting of veil is concerned,** in view of this Court's discussion , the objectors have not been able

to show any ground for lifting the veil. Hence this objection is also rejected.

6. **As regards hidden object,** there is no substance in this objection raised by the objector. Hence the same is rejected.

7. As regards objection regarding valuation of share, once two eminent Chartered Accountants have followed the methodology which is known to law and they are independent and they are renowned Chartered Accountants and independent Chartered Accountants, this Court will not interfere with the exchange ratio approved by them. All these contentions are therefore rejected.

8. **As far as debenture holders and Secured Creditors are concerned**, in view of this Court's discussion, there is no substance in this objection. Hence the same is rejected.

9. In light of the above observations, the prayer in terms of para 28(a), (b), [c], (f), (g) are granted and the prayers in terms of para 28(d) and (e) are granted subject to the above modifications.

10. In the result, the petition is allowed with the above observations and directions and the scheme of amalgamation is sanctioned accordingly.

11. Towards fees of Assistant Solicitor General Mr. Harin P. Raval, the same is quantified at Rs. 3500/- and the transferee Company is directed to pay the same.

12. At this juncture, the learned Senior counsel has invited my attention to Rule 37 of the Companies (Court) Rules which provides orders to be drawn up. He has further invited

my attention to Form No. 41 under Rule 81 and Form No. 42 under Rule 84. In view of Rule 37 of The Companies (Court) Rules, 1959 this Court directs that no order need be drawn up by the Registrar and this order will be a final order and once the Transferor Company files final judgement of this Court along with operative order, the same will be in compliance with Section 394 read with Form 42 under Rule 84 there will be sufficient compliance and the Transferor Company need not file Schedule particularly Part-I, II and III of the said Form No. 42. The same will be sufficient compliance of Sections 391(3) & 394(3) of the Companies Act.

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11. After pronouncement of the judgment, Shri Girish Patel, learned Senior Counsel with Mr.Shalin Mehta, learned advocate appeared for

some of the objectors submitted that the effect and operation of implementation of the judgment be stayed for some time enabling the objectors to approach the appellate forum.

12. Mr.K.S. Nanavati, learned Senior Counsel states that in amalgamation matter normally when the Court sanctioned the scheme, there is no question of granting any stay. He has relied upon the judgment of this Court in [2007] 138 Company Cases 204 in the matter of Core Health Care Limited where also in similar circumstances when the objectors asked for stay, this Court rejected the said prayer of stay. He has further stated that in that very matter, O.J.Appeal was filed being O.J. Appeal No.36 of 2007 by HDFC Bank Limited and in that Civil Application No.99 of 2007 was filed. The Division Bench of this Court (Coram: M.S. Shah and H.B. Antani, JJ.) by order dated 4.4.2007

pleased to pass the following order:

> "Rule returnable on 18.4.2007. Mrs. Swati Soparkar waives service of rule on behalf of Core Health Care Ltd. and Nirma Ltd.
>
> Any action which the respondents take shall be subject to the result of the appeal and the beneficiary shall also be informed accordingly.
>
> Notice shall also be issued to the learned Standing Central Government Counsel."

13. In view of this, Mr. Nanavati stated that even the Appellate Court also does not grant stay, there is no question of granting stay by this Court.

14. In view of the order passed by this

Court, one by learned Single Judge and also Division Bench, this Court therefore reject the prayer of stay made by learned Senior Counsel Shri Girish Patel with Mr.Shalin Mehta. In view of the same, the said prayer is rejected.

Date: 16/8/2007 (K.M. MEHTA, J)